Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

R.H., by his parents and next friends
Emily and Matthew H.,
Petitioner,

v.

Plano Independent School District,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit held that federal mainstreaming requirements of the Individuals with Disabilities Education Act do not have to be applied to preschoolers in certain circumstances. Since the Third, Seventh, and Tenth Circuits do apply these mainstreaming requirements to preschoolers in those same circumstances, preschoolers with disabilities are no longer equally protected by the law.

Three questions are presented:

1. Under 20 U.S.C. § 1412(a)(5)(A), must a mainstreaming analysis be applied to determine whether a preschooler with a disability can achieve a satisfactory education in the regular class even when there are no regular public preschool classes offered?

2. Under 20 U.S.C. § 1412(a)(5)(A), if a preschool child with a disability can receive a satisfactory education in a regular class, must a school district investigate the mainstream options it has available before placing a child in a more restrictive class?

3. Under 20 U.S.C. § 1412(a)(5)(A), does the statutory preference for public school over private school override a preschool child's substantive right to be educated in his least restrictive environment?

LIST OF PARTIES

The parties in this case are R.H., by his parents and next friends Emily and Matthew H., and Plano Independent School District.

CORPORATE DISCLOSURE STATEMENT

R.H. is an individual.

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June 25, 2010 Denial of the Petition for Panel Rehearing by the Court of Appeals for the Fifth Circuit

OPINION BELOW

The Eastern District of Texas affirmed the May 30, 2006 opinion of the hearing officer of the administrative due process hearing. The Fifth Circuit affirmed the March 31, 2008 decision of the United States District Court for the Eastern District of Texas, Not Reported in F.Supp.2d, 2008 WL 906289 (E.D.Tex. 2008) (including the Report and Recommendation of the Magistrate Judge). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *R.H. v. Plano Independent School District*, 607 F.3d 1003 (5th Cir. 2010). *See* Appendices A-C in Volume II.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on May 27, 2010. Despite several substantive errors of fact and law, the Petition for Panel Rehearing filed on June 10, 2010 was denied on June 25, 2010. *See* Appendix D and E in Volume II.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 20 United States Code § 1400(c)(5)(C).

Findings.

(5) Almost 30 years of research and experience has

demonstrated that the education of children with disabilities can be made more effective by--

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent.

Title 20 United States Code § 1412(a)(1)(A).

Free appropriate public education.

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

Title 20 United States Code § 1412(a)(5)(A).

Least restrictive environment ("LRE").

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the

disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Title 20 United States Code § 1412(a)(10)(B)(i).

Children placed in, or referred to, private schools by public agencies.

In general Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

Title 34 Code Federal Regulations § 300.114 (a)(1), (2).

LRE requirement.

(a) General. (1) Except as provided in §300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§300.115 through 300.120.

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Title 34 Code Federal Regulations § 300.115(a), (b).

Continuum of Alternative Placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under §300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement

Title 34 Code Federal Regulations § 300.116(a).

Placements.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) The placement decision--

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

Title 34 Code Federal Regulations § 300.118.

Children in public or private institutions.

Except as provided in §300.149(d) (regarding agency responsibility for general supervision of some individuals in adult prisons), an SEA must ensure that §300.114 is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

Title 34 Code Federal Regulations § 300.325(c).

Private school placements by public agencies.

Responsibility. Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

STATEMENT OF THE CASE

1. This case involves the Individual with Disabilities Education Act's ("IDEA") requirement that children with disabilities, including preschoolers, are educated with nondisabled children to the maximum extent appropriate. 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1412(a)(5)(A) (this is also referred to as the IDEA's mainstreaming requirement). In other words, a child must be educated in his least restrictive environment (the extent to which mainstreaming is appropriate for him). *Id.* The IDEA clarifies how to determine to what extent mainstreaming is "appropriate," stating that removal from the regular class should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.* To this end, states are required to make available a "continuum of alternative placements" which must include "regular classes." 34 C.F.R. § 300.115.

The circuit courts have developed varying yet similar analyses to ensure the mainstreaming requirement of the IDEA is complied with (listed below). These analyses generally consider the accommodations the school district attempted to provide in the regular class, the academic benefit the child can receive from a regular class, the nonacademic benefit the child can receive from a regular class, and whether the child is disruptive to the other students in a regular class. Most circuits also consider in varying degree the cost of educating the child in a regular class, though some circuits do not enumerate this as a mainstreaming factor. While these analyses are used by other circuits to determine whether all children protected by the IDEA ages 3-21 have been mainstreamed in accordance with the law, the Fifth Circuit contends that such an analysis is not appropriate for a certain subset of children: preschoolers living in school districts that do not offer regular public preschool classes.

2. As evidenced by the Individual Education Plan ("IEP") documents in this case, respondent Plano Independent School District ("PISD") offered only one placement for R.H.: a full-time special education placement at a Preschool Program for Children with Disabilities ("PPCD"). The record reveals that PISD is intent on placing preschool children with disabilities in its PPCD classes, whether or not this constitutes the least restrictive environment for a particular child. PISD will not utilize private preschools, claiming it has no control to implement an IEP in a private setting, and it does not discuss with parents or offer any other regular class options for preschoolers available within the district, such as its Early Learning Centers, Head Start, or regular

kindergarten classes. R.H.'s due process complaint alleged he had not been educated in the least restrictive environment.

3. The due process hearing officer blessed R.H.'s placement in a full-time special education class at the PPCD without first making a determination as to whether education for R.H. could be achieved satisfactorily in regular classes with supplemental aids and services. This was a violation of the IDEA's mainstreaming requirement.

The hearing officer's conclusion that "there are no regular classrooms" for preschoolers has proved to be problematic because the Fifth Circuit uses the lack of regular public preschools as a basis for avoiding the application of the IDEA's mainstreaming requirement.[1] While school districts should be given deference with respect to which regular class alternatives are the most feasible and cost-effective to utilize, the fact that there are no public "regular classrooms" in a school district should not give school districts the green light to segregate impressionable young children with disabilities into full-time special education classes.

4. R.H. appealed the hearing officer's decision to the District Court, arguing that a mainstreaming analysis (such as the factors set forth in the Fifth Circuit's *Daniel R.R.*, 874 F.2d at 1044) is necessary

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[1] While there are no free, district operated regular preschools (the compulsory school age is six), there are tuition based district operated regular preschool classes, private regular preschool classes, kindergarten regular classes which can be used for preschoolers for LRE purposes, and Head Start preschool classes.

to guarantee his right to be educated in a regular class if appropriate and it was thus fundamental error to ignore uncontroverted evidence which showed a) the school district took no steps to accommodate R.H. in a regular class before assuming he needed a special education class; b) R.H. obtained educational benefit in the regular education classroom; c) R.H. obtained non-academic benefit in the regular education classroom; d) R.H.'s presence in the regular education classroom did not detrimentally affect the other students in the classroom; and e) there were regular preschool class options close to R.H.'s residence.

5. Logically, it is not possible under the IDEA to determine that a special education class is a child's least restrictive environment without ever asking whether he can receive a satisfactory education in a regular class. However, without ever applying the necessary mainstreaming analysis, the District Court held that R.H.'s full-time special education class mainstreamed him to the maximum extent appropriate and thus was his least restrictive environment.

6. R.H. appealed the District Court decision to the Court of Appeals for the Fifth Circuit. Again without applying a necessary mainstreaming analysis, the Fifth Circuit affirmed the school district's placement of R.H. into a full-time special education class. The IDEA clearly states that a child can be removed from a regular class under only one condition: when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §

1412(a)(5)(A). The Fifth Circuit creates an exception to this statutory requirement and allows the removal of preschoolers from the regular class even in the absence of this condition being met. The Fifth Circuit permits removal from the regular class based only on the lack of a regular public preschool in the school district and justifies its perceived lack of options by disfavoring private preschool placements,[2] and failing to explore alternative regular class options.

7. The Fifth Circuit's holding that the IDEA's mainstreaming requirement does not apply to preschoolers in school districts which do not operate regular public preschools creates a conflict with the statutory language of the IDEA and holdings of the Third, Seventh, and Tenth Circuits.

8. This case arose from an appeal of a due process hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2)(A). Thus, the District Court had jurisdiction of the federal claims in the action under 28 U.S.C. § 1331. The Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

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[2] Private school placements are expressly permitted by federal law for fulfilling the least restrictive environment requirements for preschoolers. 20 U.S.C. § 1412(a)(10)(B)(i); 34 C.F.R. §§ 300.118; 300.325(c).

REASONS FOR ALLOWANCE OF THE WRIT

Whether a preschool child with a disability can be placed in a more restrictive setting than necessary under 20 U.S.C. § 1412(a)(5)(A) is an important question on which the circuit courts are split, and on which this Court's guidance is urgently needed. The preschool years present unique challenges and require creative solutions since very few school districts in the United States provide free public preschools. The preschool years are crucial for children with disabilities, and especially for children like R.H. who are high functioning with autism. While the numbers of newly diagnosed infants and toddlers with autism continue to soar, experts warn that early intervention in the areas of self-help, communication, and social skills are crucial. With appropriate role models and intensive early intervention, many of these children can be dismissed from special education programs at an early age to ultimately live independent, self-sufficient lives. However, if segregated at an early age in classes with primarily children not able to serve as role models for these skills and unable to provide appropriate feedback for communication and socialization, the education and sustenance of children with autism can become costly for taxpayers. Such segregation often results in the high costs associated with providing special education until the child is 21 years old, which leads to even greater government assistance as an adult. Moreover, the failure to recognize a child's substantive right under the IDEA to be educated with nondisabled peers to the maximum extent appropriate regresses decades of progress achieved by American jurisprudence.

Four Circuit Courts of Appeal, including the Fifth Circuit in this case, have considered the least restrictive environment obligations school districts have for preschool children with disabilities. Specifically, the Fifth Circuit upheld a special education preschool class as the least restrictive environment without ever determining whether the preschooler could benefit from a regular class. The Third, Seventh, and Tenth Circuits on the other hand, upheld preschools designed for nondisabled children as the least restrictive environment when the preschooler can benefit from a regular class. The Third, Seventh, and Tenth Circuits are appropriately applying IDEA's mandate to provide a regular class and only remove the child to a more restrictive special education class if the severity of the child's disability requires the removal. The Fifth Circuit is missing this mainstreaming intention of the IDEA by only evaluating the options offered by the school district without first determining the child's ability to be mainstreamed.

The split among the Circuits that have ruled on the least restrictive environment issue at the preschool level requires resolution. Parents of preschool children remain uncertain about the rights of their children and whether to incur the expense of enforcing these uncertain rights. Specifically, in some circuits, the courts have held that if a preschooler can be mainstreamed, then a special education class in a hybrid preschool is not appropriate, and the child has a right to be educated in a regular preschool class. The Fifth Circuit, on the other hand, has held that a special education class in a hybrid preschool is mainstream enough regardless of the child's abilities.

School districts are similarly in limbo with respect to how to legally provide a free appropriate public education ("FAPE") in the least restrictive environment to preschool children with disabilities. The needs of children with autism and the least restrictive environment requirement of the IDEA are two of the most commonly litigated areas of special education, and the preschool years present the greatest legal uncertainties. The resources presently expended on litigating the uncertainties regarding these issues would be far better spent on education. In addition, the ramifications of the Fifth Circuit's decision are significant. Left undisturbed, this decision will result in the failure to provide access to regular classes for preschool children with disabilities throughout the Circuit, and in the other circuits that have adopted the Fifth Circuit's mainstreaming analysis.

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER A MAINSTREAMING ANALYSIS IS REQUIRED

A. Avoiding A Mainstreaming Analysis Conflicts With The Mainstreaming Intent Of The IDEA

The IDEA specifically mandates the placement of children with disabilities in regular education classrooms whenever possible. *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *The Individuals with Disabilities Education Act Amendments of 1997*, 105th Cong. 105-95 (1997) (statement of George Miller) ("The intent behind [the 1997 Amendments to the IDEA] was to strengthen the least restrictive environment requirement and participation of children with disabilities in the general curriculum and the regular education classroom."). Section 1412 requires that "to the maximum extent appropriate, children with disabilities are educated with children who are not disabled," and that the "removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." 20 U.S.C § 1412 (a)(5)(A).

The placement of "a child in a school for disabled children runs counter to the policy of the IDEA of 'mainstreaming' disabled children to the 'maximum extent appropriate.'" *Casey K. ex rel. Norman K. v. St. Anne Community High Sch. Dist. No. 302*, 400 F.3d 508, 512 (7th Cir. 2005). Accordingly, school districts

should be required to show that the full range of supplementary aids and services was not only considered, but that accommodating steps were made prior to recommending placement in a more restrictive classroom. School districts should also be required to show that adequate consideration was given to both the academic and nonacademic benefits a child with disabilities will receive from a mainstreamed education.

To this end, several standards have been adopted to determine when a school district may remove a child from a regular educational classroom without violating Congress' mandate for inclusion. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215 (3d Cir.1993); *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Sch. Dist. of Wis. Dells v. Littlegeorge*, 295 F.3d 671, 672 (7th Cir.2002); *A.W. v. N.W. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir.1987); *Sacramento v. Rachel H. by Holland*, 14 F.3d 1398 (9th Cir. 1994); *L.B. v. Nebo School District*, 379 F.3d 966, 977 (10th Cir. 2004); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991). These standards are commonly referred to as the *Roncker*, *Daniel R.R.* and *Holland* tests.

The *Daniel R.R.* test was specifically designed by the Fifth Circuit in response to litigation concerning a preschool child with a disability. It has also been adopted by the Third Circuit in *Oberti*, 995 F.2d 1204 and the Tenth Circuit in *Nebo*, 379 F.3d 966. Importantly, the Fifth Circuit in *Daniel R.R.* recognized that:

> the decision whether to mainstream a child must include an inquiry into whether the student will gain any educational benefit from regular education. Our analysis cannot stop here, however, for educational benefits are not mainstreaming's only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment.

Daniel R.R., 874 F.2d at 1047-58. A refusal to apply this analysis at the preschool level when there is no regular public preschool option derails this protection for the most vulnerable of those individuals for which the IDEA is intended to protect. It makes the *Daniel R.R.* test, developed with respect to the education of a preschooler with a disability, inapplicable to a vast majority of preschoolers in the Fifth Circuit, depending on whether the particular school district funds public preschools. The Third and Tenth Circuits, which have adopted the *Daniel R.R.* test, may similarly withhold the protections this analysis offers from preschoolers with disabilities in school districts that do not fund public preschools. A child's federal right to be mainstreamed to the

maximum extent appropriate should not be dependent on the school district in which the child resides.

B. The Fifth Circuit Creates A Conflict With Other Circuits In Holding That A Mainstreaming Analysis Is Not Necessary When There Is No Regular Public Class

The facts of the Third Circuit's *Kingwood* case, in which Justice Alito wrote the opinion, are strikingly similar to the facts of the present case. *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577-580 (3d Cir. 2000). In both cases, there was no "regular" public preschool. In both cases, the school district offered a hybrid preschool class: a class designed for children with disabilities that integrated typically developing children. Finally, in both cases, the parents utilized a private preschool to provide the least restrictive environment for their child.

In finding that it is clear under the terms of the IDEA that the hybrid preschool class is more restrictive than a regular fully mainstreamed class, the Third Circuit found such a setting would ordinarily be the least restrictive environment under only two circumstances: 1) if the child cannot receive a satisfactory education in a regular class with supplemental aids and services, or 2) where a regular classroom is not available within a reasonable commuting distance of the child. Importantly, the Third Circuit did not define "regular" as the hearing officer did in the present case to mean a public preschool because the record in that case had already revealed there wasn't one. Rather, the case was

remanded to investigate potential alternative regular classroom placements.

Given the Third Circuit's recognition that a hybrid preschool class may be the least restrictive environment if the child can not receive a satisfactory education in a regular class, it is implicit that such a determination must be made, even as in that case, where there is no regular public preschool option. The Fifth Circuit's refusal to make the determination of whether R.H. could receive a satisfactory education in a regular class (by applying the *Daniel R.R.* test), and placing him directly in the more restrictive special education class without investigating whether regular class options were available, conflicts with the Third Circuit.

Similarly, these facts repeat with the Tenth Circuit case *Nebo*, 379 F.3d 966. There was no regular public preschool, the school district recommended a placement in a hybrid preschool class, and the parents placed their child in a regular private preschool. Here again, despite the lack of a regular public preschool, the Court applied the Fifth Circuit's *Daniel R.R.* test. This analysis revealed that even though some of the child's needs could be met at the hybrid preschool, the hybrid preschool was not the child's least restrictive environment and the school district had accordingly violated the IDEA.

However, despite the application of the Fifth Circuit's *Daniel R.R.* test in *Nebo* where there was no regular public preschool, the Fifth Circuit has held that this very analysis does not speak to a case where there is no regular public preschool. Appendix at 80a.

In the present case, the Fifth Circuit never asked whether R.H. can benefit from a more inclusive setting. The Fifth Circuit assumed, along with the school district, that an IEP can't be implemented in a private setting, but this did nothing to reveal whether R.H. can be mainstreamed, especially since there were other regular class options available.

The Fifth Circuit opinion in the present case directly conflicts with the Third and Tenth Circuits by holding that a mainstreaming analysis is not applicable in the case of a preschooler in a school district with no regular public preschool. The Fifth Circuit eliminates the least restrictive environment protection of the IDEA for preschoolers. Without a mainstreaming analysis, and thus a way to determine a child's least restrictive environment, this protection is lost and preschoolers can be segregated with no explanation.

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER A SCHOOL DISTRICT MUST INQUIRE INTO AVAILABLE REGULAR CLASSROOM OPTIONS WHEN APPROPRIATE

As noted above, in *Kingwood*, the Seventh Circuit stated that a hybrid preschool class may be the least restrictive environment even if a child can be mainstreamed if there is no regular classroom available within a reasonable commuting distance of the child. 205 F.3d at 579. Accordingly, the case was remanded to make an inquiry into whether there were regular classroom options available. *Id.* at 581.

In the present case, R.H. argued to the Fifth Circuit in briefing and during oral argument that there existed several regular classroom options, even though there was no regular public preschool. For instance, PISD operates several "Early Learning Centers," which are tuition based regular preschool classes within the local high schools, one of which is located closer to R.H.'s home than the specialized early childhood campus to which PISD restricted him. In addition, PISD has the option of utilizing its regular kindergarten classes to place preschoolers with disabilities. At the age of four, R.H. was reading to his classmates in his private preschool and had an IQ of 127, so being placed with kindergarten students would have been a feasible option to provide him a regular class. Head Start, which is frequently used by school districts to provide a regular class, would have been another option. Finally, R.H.'s private preschool provided a regular class.

However, the Fifth Circuit permitted PISD's assumption that it would not be able to implement an IEP in a private setting claiming it would have no control, despite a public school's obligation under IDEA to oversee the implementation of IEPs when districts place children in private settings. 34 C.F.R. § 300.146; 34 C.F.R. § 300.325(c). In addition, unlike the Seventh Circuit, the Fifth Circuit did not require the school district to explore the other regular class options. Instead, it concluded that since there were no regular public preschools, a more restrictive preschool class was acceptable. Had R.H. resided in the Seventh Circuit, the school district would have been required to explore the numerous options to provide him with a regular preschool class, and his substantive right to be educated with nondisabled

peers to the maximum extent appropriate would have been protected.

III. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER THE STATUTORY PREFERENCE FOR PUBLIC OVER PRIVATE PLACEMENTS OVERRIDES A CHILD'S RIGHT TO LRE

A. Giving Deference to Public Placements At The Preschool Level Conflicts With The Mainstreaming Requirement Of The IDEA

The Fifth Circuit correctly recognizes that the IDEA "was designed primarily to bring disabled students into the public educational system and to ensure them a free appropriate public education." Appendix at 79a. However, the Fifth Circuit fails to recognize the mainstreaming purpose implicit in this intention. As the Supreme Court has recognized, the Act expressed Congress' concern about "the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." *School Comm. Of the Town of Burlington v. Department of Educ.*, 471 U.S. 359, 373 (1985). Thus, when the "private" class represents a less restrictive environment and is a regular class of nondisabled peers, the private placement satisfies the substantive intention of the IDEA to end unnecessary segregation. The Fifth Circuit wrongly concludes that the "public" aspect of IDEA supersedes a child's right to be educated with nondisabled peers to the maximum extent appropriate.

For a child who can be mainstreamed, the public K-12 general education classes are usually also the least restrictive environment. However, with pre-K where there is no regular public preschool class, the least restrictive environment may be a private preschool. The Fifth Circuit failed to understand this important distinction with respect to preschool when it stated that "[t]he IDEA [] makes removal to a private school placement the exception, not the default." Appendix at 79a. While this is true, a preschool child in a district with no regular public preschool should be an exception, and the Fifth Circuit's expressed preference for the public environment, whether or not it represents the least restrictive environment, is contrary to the IDEA. The objective of the IDEA is not to have all children with disabilities in public school, it is to achieve the outcome of appropriate education, including further education, employment and independent living in the community.

Thus, at the preschool level, the "public" in FAPE often means publicly funded, and not necessarily operated by the public school district. States and appropriate local education agencies are permitted, under the law, to place children with disabilities in private schools and facilities while providing them with special education and related services in accordance with their IEP, at no cost to their parents, as a means of carrying out the FAPE and LRE requirements. 20 U.S.C. § 1412(a)(10)(B)(i). In fact, 34 C.F.R. § 300.118 specifically states that LRE must be "effectively implemented, including, if necessary, making arrangements with public and private institutions...." The Office of Special Education Programs, which administers the IDEA, expressly

provides that local education agencies that do not operate preschool programs for nondisabled preschool children may use some alternative methods for meeting the LRE requirements including placing children with disabilities in private school programs for nondisabled preschool children.

B. The Fifth Circuit Creates a Conflict With Other Circuits In Its Refusal to Utilize Private Preschool Placements

In the present case, PISD offered only its publicly operated special education class in a Preschool Program for Children with Disabilities. The Fifth Circuit accepted PISD's unsupported contention that R.H.'s IEP could not be implemented in a private setting, even though the parents were doing precisely that – at their own expense. The Fifth Circuit upheld a placement for R.H. in a public class which was more restrictive than his mainstream private class. This is contrary to the Third, Seventh, and Tenth Circuits, which have all found private preschool placements appropriate to provide a least restrictive environment for preschoolers with disabilities.

In *Kingwood*, the Third Circuit acknowledged that New Jersey state law barred the School Board from considering the particular unaccredited private preschool on its continuum of alternative placements while recognizing that if the particular private school at issue was not barred by state law due to lack of accreditation, the Board would have been required to approve the private preschool placement as the one providing a FAPE in the least restrictive environment. 205 F.3d at 580-582.

In *LaGrange*, there was no evidence that the child could not benefit from a more inclusive setting, and the Seventh Circuit held that the private regular preschool in which the parents placed their child was the least restrictive environment. *Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education*, 184 F.3d 913, 916-917 (7th Cir. 1999).

In *Nebo*, the Tenth Circuit applied the Fifth Circuit's mainstreaming analysis which revealed that the child's mainstream private preschool class was the least restrictive environment – not the hybrid public preschool class offered by the school district. 379 F.3d at 978-979.

Yet in the present case the Fifth Circuit found that despite the evidence of R.H.'s success in his regular private preschool and his unique needs and abilities to be educated in a regular classroom, a more restrictive public class constituted the least restrictive environment.

The result of this failure to properly apply the mainstreaming requirement of the IDEA at the preschool level, and instead to allow courts to pick and choose students for which they will apply a mainstreaming analysis based on the public options a district makes available to one or all students, is essentially legalizing discrimination and permitting unequal protection of the laws, which results in frightening long-term implications for this vulnerable demographic and the country as a whole.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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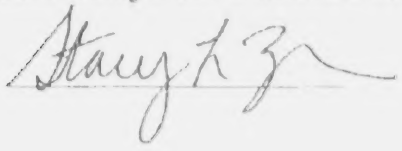

Supreme Court, U.S.
FILED

10-436 SEP 21 2010

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

R.H., by his parents and next friends
Emily and Matthew H.,
Petitioner,

v.

Plano Independent School District,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI VOLUME II – APPENDIX

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APPENDIX

APPENDIX A – AMENDED OPINION OF THE DUE PROCESS HEARING OFFICER DECIDED MAY 30, 2006

DOCKET NO. 108-SE-0106

R. H.		BEFORE A SPECIAL
b/n/f M.H. & E.H.	§	EDUCATION
Petitioner	§	
	§	
V.	§	HEARING OFFICER
	§	FOR THE
PLANO INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	ST ATE OF TEXAS
	§	

AMENDED DECISION OF HEARING OFFICER

Statement of Case

On January 25, 2006, R. H., by next friends, M. H. and E. H., ("Petitioner") filed this request for due process hearing under the Individuals with Disabilities Education Improvement Act ("IDEA 04"), 20 U.S.C. § 1400 *et seq.*, against the Plano Independent School District ("Respondent" or "District") and alleged that Respondent failed to provide Petitioner with a free appropriate public education ("FAPE"). Petitioner was represented by Myrna H. Silver, attorney at law. Nona C. Matthews, of the law firm, Walsh, Anderson, Brown, Schulze & Aldridge, P.c., appeared on behalf of Respondent.

After a pre-hearing conference on February 27, 2006, a Pre-Hearing Order was issued. At the request of Petitioner for certain specific changes to his claims and issues, an Amended Pre-Hearing Order was issued that incorporated those changes. The due process hearing convened on April 4, 2006, and

continued on April 6 and 7, 2006. Following the presentation of each party's case, the parties filed written closing arguments, and by their agreement, the decision due date in this matter was set for May 31, 2006 in compliance with the forty-five day rule.

Petitioner made the following claims against the District:

1. The District acted in bad faith and failed to comply with an agreement reached by the parties at a resolution session in a prior due process complaint;
2. In January, 2005, the District offered and placed Petitioner in its PPCD program at Beaty Early Childhood Center and failed to consider the full spectrum of educational programs available to Petitioner during the spring semester, 2005;
3. Although prior to Petitioner's enrollment in the District, Petitioner received occupational therapy ("OT") from Early Childhood Intervention ("ECI"), and although Petitioner's private evaluations recommended OT, the District failed to consider the provision of occupational therapy ("OT") to Petitioner and failed to provide OT to Petitioner;
4. During the 2005-2006 school year, the District failed to provide an appropriate length of school day to Petitioner;
5. The District offered an inappropriate educational program to Petitioner in that a portion of the program included no peers of Petitioner, and the District did not offer a staff person with appropriate certification, namely an occupational therapist, to address Petitioner's feeding skills;
6. The District failed to offer or provide an appropriate speech therapy ("ST") program to

Petitioner in that it offered an inadequate amount of one to one speech therapy;
7. In the spring semester, 2005, the District failed to address in-home training;
8. The District failed to consider Extended School Year ("ESY") services to Petitioner in the summer, 2005; and
9. The District failed to properly evaluate Petitioner's need for physical therapy ("PT"), failed to consider the provision of PT to Petitioner, and failed to consider or follow the recommendations of a private PT evaluation that recommended PT for Petitioner.

Based on the above claims, the following issues were adjudicated at hearing:

1. Whether or not a resolution session agreement between the parties was reached in the fall semester, 2005 and, if an agreement was made, whether or not the District failed to comply with such agreement;
2. For the spring semester, 2005, whether or not the District considered the full continuum of placement options, and whether or not the District's placement for Petitioner for the spring semester, 2005, was appropriate;
3. Whether or not the District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year was in the least restrictive environment ("LRE") and resulted in a denial of FAPE to Petitioner; and
4. Whether or not the District failed to consider or provide ESY to Petitioner during the summer, 2005.

Petitioner requested the following relief in this proceeding:

1. An order directing the District to reimburse Petitioner's parents for all tuition and fees incurred at Petitioner's current private school from the end of May, 2005 to the present, and an order directing the District to pay for tuition and fees incurred prospectively by Petitioner until Petitioner begins kindergarten in the fall semester, 2008;

2. An order directing the District to reimburse Petitioner's parents for privately conducted ST, OT, and PT evaluations in the summer, 2005;

3. An order directing the District to reimburse Petitioner's parents for expenses incurred for ST provided by Valerie Sherman from September, 2005 to the present time, and an order directing the District to pay for such ST services conducted prospectively on a year round basis, such ST being on a one-to-one basis in an amount of two, 30 minutes sessions per week, until Petitioner begins kindergarten at the District or until it is determined that Petitioner no longer needs such therapies; and

4. An order directing the District to reimburse Petitioner's parents for privately conducted ST, OT and PT by Advanced Therapy Services from May, 2005 to the present time, and an order directing the District to pay for such ST, OT, and PT services conducted prospectively on a year round basis until Petitioner begins kindergarten at the District or it is determined that Petitioner no longer needs such therapies.

Findings of Fact

1. R. H. is a four-year-old child, and resides with his parents within the geographical boundaries of the District. [Petitioner Exhibit 1 and 2]

2. Petitioner is a student eligible for special education services under the classifications of Non-

Categorical Early Childhood ("NCEC") with a suspicion of autism and speech impairment ("SI"). [Respondent's Exhibit 1]

3. Petitioner received services from the ECI Program beginning in March, 2004, having qualified for such services in the area of communication/cognition. [Petitioner's Exhibit 27]

4. Petitioner experienced separation anxiety at night and school, and awoke once or twice at night at least 50% of time before his third birthday. [Petitioner's Exhibit 27; Respondent's Exhibit 1]

5. From June to December, 2004, on a full-day basis, Petitioner attended TLC Child Development Center ("TLC"), a private pre-school for typically-developing children. He required extra attention in art and extra direction when it was time to wash his hands. He spoke single words and some two to three word phrases. His speech skills were emerging and were steadily progressing. His greatest difficulty was successful communication in a classroom setting. He had separation anxiety when he began at TLC, but by December, 2004 he was not having difficulty with separation from his mother. Petitioner was in the process of being potty trained. The TLC staff had no problems with Petitioner's behavior, but encouraged him to interact with his peers since he kept to himself. [Tr. Vol. I, Pages 1, 2, 28-30, 34; Tr. Vol. II, Pages 101-103]

6. Prior to enrollment in the District, Petitioner received ECI services on a 1: 1 basis for 2 hours, 15 minutes per week. The weekly service consisted of 90 minutes speech therapy and 45 minutes occupational therapy for sensory regulation. [Tr. Vol. I, Page 25]

7. Numerous assessments of R. H. have been performed over a one year period. Those assessments

and results appear on Table I at the end of this decision.

8. At approximately age three, Petitioner could throw, catch and kick a ball, and work puzzles. [Petitioner's Exhibit 1; Respondent's Exhibit 1]

9. At almost four years, Petitioner could catch, throw and kick a ball, and jump up and down on both feet. [Petitioner's Exhibit 18]

10. On December 10, 2004, an admission, review and dismissal ("ARD") meeting was held at which time Petitioner was identified as a student eligible for special education services under IDEA with disabilities of NCEC with a suspicion of autism spectrum disorder and S1. The committee determined that R. H. needs one-to-one instruction during transition period, small-group instruction in order to learn new information, to reinforce and practice new information, and for independent practice and generalization of skills. The committee, including Petitioner's parent, developed an individualized education program ("IEP") for Petitioner that included 60 minutes of group speech therapy. The ARD committee did not require a Behavioral Intervention Plan ("BIP"), PT or OT. Petitioner was placed in the District's early childhood program at Beaty Early Childhood School ("Beaty") which is the home campus for a child of Petitioner's age. The ARD committee discussed and considered in-home training and parent training but determined that Petitioner would be able to generalize skills across settings; thus, neither training was offered. Petitioner's parent agreed with the ARD decisions. [Petitioner's Exhibit 2; Respondent's Exhibit 2; Tr. Vol. II, Pages 143-146, 161]

11. Numerous accommodations were determined necessary for Petitioner's educational success. A sampling of his short term objectives include the following:

- Answer yes/no questions
- Increase expressive vocabulary by 15 or more words per month
- Increase length of utterance to 3-5 words
- Engage in joint attention to non-preferred activities
- Develop tolerance to changes in environment by using visual/tangible cues
- Increase on-task behavior for non-preferred activities for 3-5 minutes
- Participate in classroom tactile activities for 1-2 minutes without protest
- Expand food varieties at snack to try 2 new foods per month [Petitioner's Exhibit 2; Respondent's Exhibit 2]

12. Beaty is one of three early childhood schools in the District and has an enrollment of over 400 students; it has a state-funded pre-kindergarten program for at-risk students, pre-school programs for children with disabilities ("PPCD") where students with disabilities attend with typically developing children who are tuition paid students; a communication program for students who only have IEP communication goals, Spanish special education classroom, self-contained classroom for students with more significant needs, a centralized structured classroom for students who need a high degree of structure and individual direct instruction among other early childhood programs. The three-year-old, PPCD classes at Beaty have a maximum enrollment of 12 students with an opportunity for six students

with IEPs and six tuition students per class; the four-year-old, PPCD classes have a maximum enrollment of 15 students, with an opportunity for six students with IEPs and nine tuition students per class. All teachers at Beaty are special education certified. Additionally, Beaty has Speech and Language Pathologists ("SLPs"), teaching assistants, OTs, and physical therapists ("PTs") on campus, along with itinerant support staff persons. The PPCD classrooms have one classroom teacher, one teaching assistant, and a SLP that comes on alternating days. [Tr. Vol. II, Pages 128-135; Petitioner's Exhibit 20]

13. The teacher to student ratio in Petitioner's class at TLC is approximately 2:26. Petitioner's teacher at TLC does not have a college degree and is not certified or licensed to teach in Texas public schools. There are no OTs or STs on staff at TLC and there is no occupational therapist that assists Petitioner during lunch at TLC. [Tr. Vol. II, Pages 100, 112-113, 120-123, 151]

14. Upon enrollment in the District, since no data existed regarding Petitioner's need for ESY, the ARD committee did not consider ESY. His teacher saw no indicators that Petitioner would regress during the summer months, and ESY was not offered to Petitioner for the summer, 2005. No ARD meeting was held to consider ESY for the summer, 2005. [Tr. Vol. II, Page161]

15. At Beaty, Petitioner, who was 3 years old at the time, demonstrated some aggression toward his teachers. After the use of picture supports and behavioral supports, the behaviors went away after one or two weeks. [Tr. Vol. II, Pages 251-252]

16. During Petitioner's enrollment at Beaty, Petitioner's parents observed that he cried often on

the way to school and after his mother picked him up at the end of the school day. He had difficulty making decisions and regularly woke up several times a week and was inconsolable. At a March parent teacher conference, Petitioner's parent discussed what she believed were increasing negative behaviors, lack of progress in speech, a need for intensive summer therapy, and other areas of concern. After receiving no response after the conference, the parents proceeded with private evaluations by Advanced Therapy Services ("ATS") to qualify Petitioner for services, and began private therapy in May, 2005 without giving notice to the District of their intent to privately place Petitioner. [Tr. Vol. I, Pages 44-48, 139]

17. Petitioner re-enrolled in TLC at the end of the spring semester, May, 2005. TLC had stopped its curriculum for the summer. Upon Petitioner's return, TLC experienced behavior problems and potty training issues with Petitioner. [Tr. Vol. II, Pages 104-107]

18. During the summer, 2005, R. H.'s parents provided him with private ST and OT. They discontinued the services in August while they worked with the District in the formulation of his IEPs. The parents noticed deterioration in Petitioner's language skills and some basic fine motor skills during that month and resumed ST. [Tr. Vol. I, Page 40-41]

19. Petitioner's parents contacted the Beaty principal affirming their belief that Petitioner needs a volume of typically-developing peers and a longer school day, and requested an ARD meeting. The District wanted to observe Petitioner at Beaty before the ARD meeting. In response, the parents notified the

District that they would not remove Petitioner from TLC until an agreement could be made regarding his IEP, and offered to allow the District to observe Petitioner at TLC. [Petitioner's Exhibits 4,5; Tr. Vol. I, Pages 54-58]

20. An ARD meeting was held August 15, 2005 and resumed Augusts 23 during which the parents presented the private evaluation results. Their requested changes were discussed. The District wanted to do its own OT evaluation, an articulation evaluation, a functional behavioral assessment, and an in-home training assessment within one month. [Tr. Vol. I, Page 68; Petitioner's Exhibit 12]

21. Petitioner has continued to attend TLC since the summer, 2005. He arrives between 9:00-9:30 a.m., and typically leaves at 5:30 p.m. [Tr. Vol. I, Page 58]

22. Petitioner has tactile defensiveness issues and it is difficult to get him to eat new foods independently in the school setting. Presently, Petitioner continues to refuse to eat at lunchtime at TLC. At home, he refuses to try prepared foods unless heavy prompts are used with him. Even with prompts, he often refuses. Petitioner's IEP includes goals to address those issues. [Tr. Vol. I, Page 37; Petitioner's Exhibit 2, 12, 14, and 22]

23. From August, 2005 to January, 2006, the District held several ARD meetings and many efforts were made to come to an agreement for Petitioner's IEP. [Petitioner's Exhibits 12, 14, 22, and 31]

24. The District refused Petitioner's request to increase his educational program to a full day, refused to place him at TLC at District expense, and refused to provide 90 minutes of individual ST and 30 minutes of group therapy. [Petitioner's Exhibit 32]

25. The District agreed to increase Petitioner educational program from 2 hours 45 minutes per day to 3 hours 45 minutes, adding time for lunch with peers and IEP goals for his eating issues. It offered 75 minutes of group ST and 15 minutes of individual ST. [Petitioner's Exhibit 32]

26. A 25 hour week of instruction for children with autism can be a combination of intensive classroom, intensive home, or intensive individual instruction. Individual instruction by a SLP is important because communication disorder is a hallmark characteristic of autism spectrum disorder; thus, the SLP should be in the classroom on a regular, daily basis for an extended period of time. [Tr. Vol. II, Pages 59-60]

27. Apraxia is a speech disorder that is difficult to diagnose and needs to be done over time in order to account for a child's language skills or a possible language disorder. Its characteristics can be seen in many other speech disorders. [Tr. Vol. III, Page 78-81]

28. Least restrictive environment at the pre-school age is within the context of meaningful daily activities with their typically developing peers in meaningful tasks such as play and reading stories. Children with autism often fail to generalize skills that are taught in a one on one setting. [Tr. Vol. III, Pages 96-97]

29. Dual enrollment was offered to Petitioner, but was not accessed. [Tr. Vol. II, Pages 225, 236]

30. At the parents' request, the mastery level of some of R. H.'s proposed objectives are higher than originally proposed. Although the proposed short term objectives for the 2005-2006 school year are not agreed upon, the following is a summary of those

objectives which incorporate Petitioner's parents requests:

- Correctly use pronouns at the sentence level
- Initiate greetings and closures in a variety of school settings at least two times per day
- Retell a familiar story in 5 consecutive session
- Indicate understanding of concepts in unstructured classroom activities to include: first, middle, last, next to, before and after
- Parent training to assist R. H. with developing a tolerance to changes in his environment, expand his food varieties to try and accept new food, and assist with learning to toilet independently
- Expand food varieties to try one new food per week and learn to accept without protest two new foods per month
- Attend to speaker by making visual regard before following instructions
- Actively play with at least 3 toys as designed for 10 minutes with only verbal prompts for 3 consecutive days
- Take preferred items from a peer, 2 per day without prompts for 3 consecutive days
- Participate in classroom tactile activities for 1-2 minutes without protest [Petitioner's Exhibit 31; Respondent's Exhibit 5]

Discussion

Was a resolution settlement agreement reached; if so, did the District breach the agreement?

If parties to a due process proceeding reach a resolution to the dispute, the IDEA 04 requires the parties to execute a legally binding agreement that is signed by both the parent and a District representative with authority to bind the District.

Such agreement can be voided by either party within three business days of the agreement's execution. 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv). Although the parties in this matter participated in a resolution session, they did not sign a written settlement agreement. Petitioner failed to prove that a resolution settlement agreement was reached by the parties. Tatro v. State of Texas, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005). For the spring semester, 2005, did the District consider the full continuum of placement options, and was the placement for Petitioner appropriate?

The principal of Beaty was present at the December, 2004 ARD meeting and is knowledgeable of the continuum of placement options at the District. Although every type of classroom at Beaty were not specifically discussed, the committee discussed an appropriate option for R. H. in light of his educational needs for small group and one-on-one instruction and determined that the integration classroom was appropriate. Petitioner does not prevail on the issue regarding the District's failure to consider a continuum of placement options. Tatro v. State of Texas, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005). The appropriateness of Petitioner's placement will be discussed in the FAPE discussion below.

Was the District's placement of Petitioner in the spring semester, 2005, and its proposed placement for the 2005-2006 school year in the LRE; if not, did such placement result in a denial of FAPE to Petitioner?

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, (1982); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5th Cir. 1997).

The Fifth Circuit has further defined a free appropriate public education by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? Cypress Fairbanks Independent School District v. Michael F., 118 F.3d at 253.

Is the educational program individualized on the basis of the child's assessment and performance?

The District performed a FIE prior to Petitioner's third birthday. The evaluation results were the basis for Petitioner's IEPs that were developed in December, 2004. Speech therapy was recommended while occupational therapy was not although Petitioner's issues regarding tactile defensiveness during eating were addressed in his IEPs. The assessment team concluded that Petitioner did not need OT or PT because he had the necessary skills to

adequately perform in a classroom environment. During the only semester that Petitioner attended Beaty, although he had not mastered all of the IEP goals which were written for a year, he made overall progress on those goals by the end of the spring semester, 2005. Although Petitioner's parents contended that he suffered psychological side effects while at Beaty, Petitioner failed to prove that his problems were caused by his presence at Beaty.

In August, 2005, the ARD committee met at the parent's request to review Petitioner's IEP. A series of ARDs followed throughout the semester. The record reflects that the parents were active participants in the preparation of Petitioner's goals and objectives, and changes were incorporated as a result of such participation. Prior to a private physical therapy evaluation of Petitioner in the fall, 2005, there had been nothing to indicate a need for PT. The ARD committee reviewed the assessment and reports from R. H.'s TLC teacher and determined that PT was not necessary for Petitioner to adequately perform in a classroom environment.

There are two overarching issues that prevented an agreement regarding Petitioner's IEP: length of school day and individual speech therapy. Petitioner's parents do not disagree with the benefits for group speech therapy, but believe R. H. should have more individual sessions. The parents want Petitioner to have individual ST in an amount of 30 minutes, three times per week. The District proposed 15 minutes of one-to-one ST and group ST for 75 minutes per week, an increase from 60 minutes group therapy that was provided in the 2005 spring

semester. The record reflects that R. H. mastered some speech skills and progressed on all skills with the 60 minute group therapy that he received in the 2005 spring semester.

Petitioner's parents want an extended school day to total 25 hours per week. While a 25 hour per week program may be the general recommendation, the District's obligation under the IDEA 04 is to create an education program based on Petitioner's individual and unique needs. The District offered to increase Petitioner's school day from 13.75 to 18.75 hours per week to include lunchtime during which he would be with peers and his eating issues could be addressed by district personnel with the guidance of an OT. While there was expert testimony in support of both positions, I find that Petitioner's spring semester, 2005 IEP and the proposed educational program for 2005-2006 are individualized on the basis of his assessment and performance.

Is the program administered in the LRE? The IDEA requires that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled and that removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S. C. § 1412 (a)(5). Although a school is not required to try every conceivable supplementary aid or service, it should mak. more than a token effort. If education in a regular classroom with supplementary aids and services cannot be achieved satisfactorily, the school

must mainstream the child to the maximum extent appropriate. Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989).

In this case, there are no "regular" classrooms for three and four year old students. Compulsory school age in the state of Texas is six years. Tex. Educ. Code § 28.085(b). However, the District offers a variety of classes for three and four year old students, some of which are entirely for typically developing students; these classes are for students who are limited-English, Spanish speaking, or students whose only IEP goals and objectives are in the area of communication. The PPCD classrooms are made up of both children with disabilities and typically developing children, the ratio of which may be fluid and vary from approximately 1/3 students with IEPs, and 2/3 typically developing students to a more even ratio of ½ students with IEPs and ½ typically developing students.

Although Petitioner believes that a larger number of typically developing peers is more desirable such as the student make-up of TLC, other factors should be considered. Petitioner's expert witness, Dr. Felini-Smith, testified that the District's PPCD program strives to have an even mix of students and to provide an array of developmentally appropriate activities and keep the class size relatively small compared to many pre-school settings. She acknowledged that the teachers at Beaty are special educators knowledgeable of strategies for working with autistic students such as Petitioner. Her reservations with the program were the regression that was reported to her and the length of the school

day. District personnel did not see regression in Petitioner; in fact, the progress notes in his IEPs and witness testimony at hearing support that he was making progress.

Petitioner wants to continue at TLC at District expense and argues that TLC is the least restrictive environment. However, Petitioner's teacher at TLC is not a certified special educator, the student to teacher ratio is high, and no SLP is on staff. ARD documents reflect that Petitioner's parents do not believe that the teachers at TLC are trained to recognize sensory issues that affect his participation at lunch. In light of the fact that Petitioner requires an individualized education program to address his speech and communication needs and his tactile defensiveness issues, and his need for small group and one to one instruction, the Beaty PPCD program is the least restrictive environment for Petitioner.

Are services provided in a coordinated and collaborative manner by the key stakeholders: At Beaty, there is a SLP in the classroom on alternating days. During the spring semester, 2005, Petitioner's classroom teacher and the SLP worked closely together. An occupational therapist is on staff to assist with strategies for Petitioner's eating issues which can be addressed during lunchtime with his peers. In the lengthy ARD meetings that began in August, 2005, R. H.'s parents took an active part in the development and revision of his IEP. In contrast, the record reflects that there is no collaboration between the TLC teacher and the key stakeholders. The teacher testified that she did not interact with the private service providers. Services are provided

at Beaty in a coordinated and collaborative manner by the key stakeholders.

Are positive academic and non-academic benefits demonstrated? The record reflects that Petitioner benefited from his one semester at Beaty. His parent admitted to improvement in March, 2005. During the August, 2005 ARD meeting, his parent agreed that he was making progress within the school day. At the January 11, 2006 ARD meeting his mother said she believed he made *more* progress in a one to one setting. She did not say he made no progress in a group setting such as the District recommends. Commendably, Petitioner's parents want him to make maximum progress and seem to feel a sense of urgency regarding his needs. However, maximum progress is not the test. The educational benefit that an IEP is designed to achieve must be meaningful and likely to produce progress, rather than regression or trivial educational advancement. Although the educational benefit must be meaningful, schools are not required to maximize a child's potential or provide the best program. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998). Petitioner's overall progress at Beaty was meaningful.

Did the District fail to consider or provide ESY to Petitioner during the summer, 2005?
At the time Petitioner enrolled in the District in January, 2005, there was no data available to use to determine a need for ESY. The District relies on the teachers' observations of regression after breaks from school. In Petitioner's case, those breaks consisted of

weekends and spring break. His teachers did not see any regression following those breaks. However, on March 22, 2005, Petitioner's parent met with his teacher and gave her a list of her concerns which stated, "Due to the critical, limited window of opportunity for intervention benefits for autism spectrum disorders, intensive summer therapy is a must." A copy of the document was given to Petitioner's teacher to pass on to the building principal. Although the record reflects that Petitioner's teacher believed that she and the parent had resolved that concern, Petitioner's parent did not consider it resolved. No ARD meeting was held. When Petitioner's parent did not hear from the District, in April, 2005, she proceeded to obtain new evaluations of Petitioner and to seek a summer program for Petitioner. Petitioner enrolled at TLC and his parents provided him with OT services and 20 individual ST sessions of 90 minutes per week from May, 2005 to August, 2005.

Having been made aware of the parent's concerns at the mid-point of Petitioner's first semester in the District, and in light of summer's approach, it is reasonable to expect the District to respond by scheduling an ARD meeting at which time the necessary decision makers could consider the need for ESY.

The IDEA 04 requires a district to provided ESY if a *child's IEP team* determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 20 U.S.C. 1412 (a)(1) [emphasis added]. The Texas Education Agency has specified criteria for determining when ESY must be provided.

The ARD committee must make the determination regarding a need for ESY. Documentation must demonstrate that in one or more critical areas addressed in the student's current IEP objectives, the student reasonably may be expected to exhibit severe or substantial regression that cannot be recouped within a reasonable period of time. 19 Tex. Admin. Code §89.1065[emphasis added]. The District failed to consider ESY to Petitioner during the summer, 2005 and, in so doing, denied FAPE to Petitioner.

Compensatory education is an equitable remedy available for substantive or procedural IDEA violation. Burlington Sch. Comm. V. Department of Educ., 471 U.S. 359 (1985); Alamo Heights Indep. School Dist. V. State Bd. Of Educ., 790 F.2d 1153 (5th Cir. 1986). In fashioning appropriate equitable relief, consideration is given to the conduct of the parties along with the nature of relief requested. Parents of Student W. v. Puyallup School District, No.3, 21 IDELR 723 (9th Cir. 1994). Due to the parents' concern regarding a limited window of opportunity to develop speech and language skills and their conviction that R. H. needs occupational therapy, either speech therapy, occupational therapy, or both services would be appropriate compensatory services.

Petitioner's Request for Reimbursement

Regarding Petitioner's request for reimbursement for the 2005 summer program, he cannot prevail since he did not comply with the IDEA 04 notice requirement prior to his unilateral enrollment at TLC. 20 U.S.C. § 1412(a)(1O)(C)(iii). Petitioner also requests reimbursement for costs incurred from the

fall, 2005 through the present about which he provided notice to the District, along with his costs for privately obtained evaluations. To receive reimbursement, Petitioner must discharge two burdens of proof. First, he must show that Respondent's proposed 2005-2006 program was inappropriate. Second, he must show that the TLC program is appropriate. If Petitioner fails to discharge either burden, he is not entitled to reimbursement. However, if the Hearing Officer finds that the District's proposed program is appropriate, it is not necessary to reach the issue of the appropriateness of the private school placement. School Committee of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1985); Florence County Sch. Dist. Four v. Carter, 114 S.Ct. 365 (1993); Tatro v. State of Texas, 703 F.2d 823, aff'd, 468 U.S. 883 (1984). Having previously determined that Respondent's program is appropriate, nothing further must be determined regarding reimbursement for costs.

Conclusions of Law

1. R H. is a child in the Plano Independent School District who is eligible for special education services under the provisions of the IDEA 04 as a child with autism and speech impairment.

2. Respondent, Plano Independent School District, is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA 04. Plano Independent School District is RH.' s resident district and has the responsibility to provide Petitioner with a free appropriate-public education under the IDEA O 20 U.S.C. §1401(a)(18).

3. Petitioner and Respondent did not reach a resolution settlement agreement. 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv); Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. S28 (2005).

4. For the spring semester, 2005, the District considered the full continuum of placement options, and its placement for Petitioner for the spring semester, 2005, was appropriate. Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

5. The District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year is in the LRE. 20 U.S.C. §1412(a)(I) and (5); Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245; Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

6. The District failed to consider or provide ESY to Petitioner during the summer, 2005; such failure was denial of FAPE. 20 U.S.C. 1412 (a)(1);19 Tex. Admin. Code §89.1065.

Order

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, Respondent is ordered to take the following actions:

1. Convene an Admission, Review, and Dismissal Committee meeting at the earliest practicable time to consider Petitioner's needs for ESY during the 2006 summer session; and

2. Provide Petitioner with either individual or group speech therapy services, occupational therapy services, or both, as compensatory services, in the total amount of 15 hours to begin as soon as practicable. These compensatory services shall be in addition to the speech therapy services that the District has offered to Petitioner and shall occur outside Petitioner's proposed school day. The ARD committee shall make the determination of the schedule and individual session lengths based on Petitioner's age and individual needs.

All other relief not specifically granted is hereby DENIED.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of **Special Education Programs and Complaints** at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED on the 30th day of May, 2006.

_____

Brenda Rudd
Special Education
Hearing Officer
For the State of
Texas

R.H. b/n/f M.H. and E.H. v. Plano Independent
School District
Docket No. 108-SE-0106
Amended Decision of Hearing Officer

TABLE 1

Evaluation Date	**Age of Petitioner**	**Evaluation Performed**	**Results**
11.15.04	2yrs. 9mos.	Full Individual Evaluation (FIE) by District	a. Brief IQ 105 Evaluation (FIE) b. Behaviors that impede adequate development of interpersonal skills c. Difficulty with flexible thinking d. Transition difficulties e. CARS score 30 w/I range of Autism Spectrum Disorders f. No difficulties that would prevent progress on goals; no need for OT g. Significant disruptions in ability to communicate and use language; uses jargon, word approximations a few single words and occasional 2-3 word phrase h. Does not interact with peers and has difficulty attending to large group instruction

			i. Can adequately bite, chew and swallow but has limited diet [Petitioner's Exhibit 1; Respondent's Exhibit 1]
4.12.05	3 yrs. 2 mos. Approx.	Speech Assessment by Advanced Therapy Services (ATS) at request of parents	a. Mild expressive language delay and moderate receptive language delay; age equivalent 2 yrs. 8 mos. b. Oral aversion [Petitioner's Exhibit 28]
4.28.05	3 yrs. 2 mos. Approx	Occupational Therapy (OT) Assessment by ATS at request of parents	a. Peabody Developmental Motor Scales to assess reflexes, gross motor and fine motor skills. Petitioner's result: grasping age equivalent 14 months; visual-motor integration age equivalent 35 months b. Definite differences with vestibular processing and oral processing; definite difference in sensory input affecting emotional response; probable difference with emotional/social responses and behavioral outcomes of

			sensory processing c. Problem areas: decreased fine motor skills, visual-motor integration, sensory processing and self-care skills. d. Currently being potty trained [Petitioner's Exhibit 28]
9.15.05	3 yrs. 8 mos. Approx	Physical Therapy Assessment by ATS at request of parents	a. Peabody Developmental Motor Scales to assess reflexes, gross motor, fine motor skills; Petitioner rated 33 mos.-Stationary, 34 mos.-Locomotion, and 30 mos.- Object manipulation[Petitioner's Exhibit 28]
9.14.05	3 yrs. 8 mos. Approx	Addendum to FIE by District (articulation)	a. Goldman-Fristoe Test-difference in percentage consonant correct in single words and connected speech 8%; does not qualify for articulation therapy [Petitioner's Exhibit 13, Respondent's Exhibit (articulation) 8]
9.16.05	3 yrs. 8 mos. Appr	FIE-OT by District	a. No difficulty with fine motor, gross motor, self-help, or sensory processing skills that

	ox		impaired functioning in classroom b. Parents reported Petitioner is displaying tactile defensiveness to some grooming and health procedures in home setting, such difficulties do not appear to affect his ability to perform in the classroom. No occupational therapy needed to support goals and objectives in IEP. [Petitioner's Exhibit 13, Respondent's Exhibit 9)
9.3.05	3 yrs. 8 mos. Approx	FIE-Related Service of In-Home and Parent Training by District	a. Parents concerned with Petitioner's lack of self-initiated use of toilet, fixation on his written name, limited diet, tactile defensiveness to things such as tags and long sleeves on clothing, and tantrums when told no b. Parents invited to participate in meetings on topic of social skills, behavior, and potty

			training for a total of 7.5 hours. c. Related service of parent training recommended as individualized session of 3 hours by a district home trainer to help parents implement strategies learned in parent training and support meetings. [Petitioner's Exhibit 13]
9.16.05	3 yrs. 8 mos. Approx	Addendum to FIE-Behavioral assessment by District	a. Private and District preschool staff reported positive behaviors in school setting with some difficulty managing transitions from preferred to non-preferred tasks and playing appropriately with peers. b. Parents report more difficult behaviors in home setting regarding trying new foods, self-regulatory sensory and emotional needs, and adapting to routine changes. c. Petitioner's behavior consistently rated across setting within

			average range compared to his same age peers [Petitioner's Exhibit 13, Respondent's Exhibit 10]
12.1.05 report date	3 yrs. 9 mos. Approx. at evaluation	Individual Educational Evaluation by Linda Felini-Smith, PhD at request of parents	a. Full scale IQ-127;superior range of cognitive functioning compared to age mates b. PEP-R test for children with autism. Petitioner's performance was commensurate with his above average cognitive ability c. CELF-P test for language comprehension and expression tasks: below average d. Average range for single word vocabulary, comprehension of single words; articulation was good e. Phrases and sentences were intelligible, but when intelligibility decreased, it was sometimes due to jargon which appeared to be triggered by overwhelming

			language demands f. Vineland assessment of adaptive (day to day) functioning: within average range with the exception of daily living skills g. Summary: Petitioner has language and social deficits associated with autism disorder; nonverbal cognitive skills in superior range compared to same age peers; moderate communication disorder characterized by deficits in processing and production of language and pragmatics, or interactive use of language; evidences mild-moderate developmental apraxia of speech [Respondent's Exhibit 19]

DOCKET NO. 108-SE-0106

R. H.	§	BEFORE A SPECIAL
b/n/f *M.* H. & E.H.	§	EDUCATION
Petitioner	§	
	§	
V.	§	HEARING OFFICER
	§	FOR THE
PLANO INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	ST ATE OF TEXAS
	§	

SYNOPSIS

Issue: Whether or not a resolution session agreement between the parties was reached in the fall semester, 2005 and, if an agreement was made, whether or not the District failed to comply with such agreement.

Held: For Respondent

Citation: 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv); Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

Issue: For the spring semester, 2005, whether or not the District considered the full continuum of placement options, and whether or not the District's placement for Petitioner for the spring semester, 2005, was appropriate.

Held: For Respondent

Citation:	Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).
Issue:	Whether or not the District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year was in the least restrictive environment ("LRE") and resulted in a denial of F APE to Petitioner.
Held:	For Respondent
Citation:	20 U.S.C. §1412(a)(1) and (5); Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245; Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)
Issue:	Whether or not the District failed to consider or provide ESY to Petitioner during the summer, 2005.
Held:	For Petitioner
Citation:	20 U.S.C. 1412 (a)(1); 19 Tex. Admin. Code §89.1065

APPENDIX B – REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE AND ASSOCIATED ADOPTING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS ORDERED MARCH 31, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

R.H., BY HIS PARENTS AND NEXT FRIENDS, EMILY AND MATTHEW H.	§	
Plaintiff,	§	CASE NO. 4:06cv352
v.	§	
PLANO INDEPENDENT SCHOOL DISTRICT	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Now before the Court are Defendant's Motion for Summary Judgment on the Administrative Record (Dkt. 15) and Plaintiff's Motion for Summary Judgment on the Administrative Record (Dkt. 38). Having reviewed the motions, responses, and the administrative record before it, the Court finds Defendant's Motion should be GRANTED, Plaintiff's Motion should be DENIED, and the findings of the Special Education Hearing Officer for the State of Texas in this matter should be affirmed.

BACKGROUND

Plaintiff, R.H., a four-year-old boy with a disability, has filed this civil action against Defendant Plano Independent School District ("PISD"), alleging violations of the Individuals with Disabilities Education Act. Specifically, Plaintiff alleges that Defendant has violated his rights under IDEA to be educated with his non-disabled peers to the maximum extent appropriate and to be educated in the least restrictive environment, in violation of his right to a free appropriate public education.

On January 25, 2006, Plaintiff requested a due process hearing from the Texas Education Agency, in accordance with IDEA, complaining of Defendant's actions. Following the due process hearing on April 4, 6, and 7, 2006, the Special Hearing Officer issued a decision in favor of Defendant. The Special Hearing Officer made the following conclusions of law relevant to R.H.'s case here:

- For the spring semester, 2005, the District considered the full continuum of placement options, and its placement for Petition for the spring semester, 2005, was appropriate.
- The District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year is in the LRE.
- The District failed to provide ESY to Petitioner during the summer, 2005 (A.R. I at 14).

Based on these findings and the record before her, the Special Hearing Officer ordered PISD to take the following actions:

1. Convene an Admission, Review, and Dismissal Committee meeting at the earliest practicable time to consider Petitioner's needs for ESY during the 2006 summer session; and

2. Provide Petitioner with either individual or group speech therapy services, occupational therapy services, or both, as compensatory services, in the total amount of 15 hours to begin as soon as practicable. These compensatory services shall be in addition to the speech therapy services that the District has offered to Petitioner and shall occur outside Petitioner's proposed school day. The ARD committee shall make the determination of the schedule and individual session lengths based on Petitioner's age and individual needs. (A.R. I at 15).

Plaintiff now brings this civil action pursuant to 20 U.S.C. §1415(i)(2)(A) alleging that the hearing officer failed to properly interpret federal law and that her findings are not supported by the record. Plaintiff claims that PISD's placement of R.H. at Peaty Early Childhood School, a district preschool where both disabled and non-disabled children are enrolled, violated the IDEA. Plaintiff further argues that the appropriate placement for R.H. is at TLC, a private preschool which R.H. has attended and for which Plaintiff seeks reimbursement here.

STANDARD

This case arises under the IDEA, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482. The IDEA's purpose is "to ensure that all

children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

States receiving federal assistance under the IDEA must: (1) provide a "free appropriate public education" ("FAPE") to each disabled child within its boundaries, and (2) ensure that such education is in the "least restrictive environment" ("LRE") possible. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir.1997); 20 U.S.C. § 1412(1), (5). The FAPE provided must be developed to each disabled child's needs through an "individual educational program" ("IEP"), which is a written statement prepared at a meeting attended by a school district representative, a teacher, the child's parents or guardians, and, when appropriate, the child. *Michael F.*, 118 F.3d at 247; *see* 20 U.S.C. § 1414(d). In Texas, the committee responsible for preparing an IEP is known as an Admissions, Review, and Dismissal Committee ("ARD Committee").

The role of the judiciary under the IDEA is limited, leaving the choice of educational policies and methods in the hands of state and local school officials. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003), *citing Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996). The Court must reach an independent decision based on a preponderance of the evidence. *Houston Indep. Sch. Dist. v. Bobby R.*,

200 F.3d 341, 347 (5th Cir. 2000); *Cypress- Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). However, this requirement "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed.2d 690 (1982). Instead, "due weight" is to be given to the hearing officer's decision. *Id.* Thus, "courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* at 207. The Court's task therefore is not to second guess PISD's decisions or impose its own plans for the education of disabled students; rather, it is the narrow one of determining whether PISD complied with the IDEA. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *see also Daniel R.R. v. State Bd. of Edu.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

The party seeking relief under the IDEA – Plaintiff here – bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 535-537 (2005). Specifically, "a party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and the resulting placement were inappropriate under the

IDEA." *Michael F.*, 118 F.3d at 252. The IDEA also creates a presumption in favor of the education plan proposed by the school district, and places the burden of proof on the party challenging it. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Edu.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

Here, the parties concur that the is no need for additional evidence or discovery to be conducted in this proceeding. Therefore, the Court will determine the merits of the case based on the administrative record. *Austin Indep. Sch. Dist. v. Robert M.*, 168 F. Supp.2d 635, 638 (W.D. Tex. 2001), *aff'd*, 54 Fed. Appx. 413 (5th Cir. 2002); *see also Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994), *cert. denied*, 513 U.S. 839, 115 S. Ct. 123 (1994).

Both parties have filed summary judgment motions and responses framing their positions in light of the administrative record before the Court. Notably, many of the facts alleged by Plaintiff in his summary judgment pleadings do not refer to specific portions of the administrative record. The Court notes that, in summary judgment proceedings, the parties are expected to cite to specific facts in the record. *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 139 F.3d 532, 536 (5th Cir. 1998). The citations to evidence must be specific, as the district court is not required to "scour the record" to determine whether the evidence raises a genuine issue of material fact. E.D. TEX. LOCAL R. CV-56(d); *see also Ragas v.*

Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir.1998) (Rule 56 does not require court to rifle through the record in search of evidence to support a party's opposition to summary judgment). Unsubstantiated and subjective beliefs and conclusory allegations and opinions of fact are not competent summary judgment evidence. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). The Court has therefore based its analysis primarily on those portions of the record specifically cited by the parties.

ANALYSIS

In this case, Plaintiff seeks reimbursement for the cost of the minor's schooling at TLC, a private school his parents enrolled him in. For parents of a disabled child to be entitled to reimbursement for private schooling, they must show both that (1) the public placement violated the IDEA and that (2) the private school placement was proper under IDEA. *Florence County School Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 12-13, 114 S.Ct. 361, 365 (1993); *Town of Burlington v. Dep't. of Edu.*, 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003 (1985). If reimbursement is appropriate, it can be retroactive from the time of placement in the private school. *Id.*

Thus, the Court will first look to whether PISD's placement of Plaintiff at Beaty Early Childhood School, a school within the District, violated the IDEA. If the Court finds that it did not, then it need not reach an analysis of the propriety of the private school placement at TLC.

Under the IDEA, public school districts in states receiving federal funds must provide each child with a FAPE. 20 U.S.C. § 1412(a)(1). To establish that PISD failed to provide R.H. with a FAPE, Plaintiff must first demonstrate that: (i) PISD failed to comply with the procedures set forth in IDEA; or (ii) the individualized education program (IEP) developed by PISD through the IDEA's procedures was not reasonably calculated to enable R.H. to receive educational benefits. *Bd. of Edu. v. Rowley*, 458 U.S. 176, 207-08, 102 S. Ct. 3034, 3051 (1982). Because Plaintiff alleges no procedural violations of the IDEA here, the Court focuses on whether PISD developed an IEP for R.H. that was reasonably calculated to enable him to receive educational benefits.

In determining whether an IEP is appropriate, the Fifth Circuit has outlined four factors to consider: (1) whether the program is individualized on the basis of the student's assessment and performance; (2) whether the program is administered in the least restrictive environment; (3) whether the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) whether positive academic and non-academic benefits are demonstrated. *Michael F.*, 118 F.3d at 253.

In other words, an IEP must be geared to provide "meaningful" educational benefit. *Rowley*, 458 U.S. at 192; *see also Michael F.*, 118 F.3d at 248. The inquiry does not turn, however, upon whether the District provided R.H. with an education designed to maximize his potential. *Michael F.*, 118 F.3d at 247-48. As the IDEA guarantees a "basic floor or

opportunity," the District is only bound to provide "access to specialized instruction and related services which are individually designed to provide educational benefit." *Rowley*, 458 U.S. at 201. "Nevertheless, the educational benefit to which the [IDEA] refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.'" *Michael F.*, 118 F.3d at 248 (footnotes omitted) (quoting *Bd. of Educ. of the E. Windsor Reg'l Sch. Dist. v. Diamond*, 808 F.2d 987, 991 (3d Cir.1986)).

Thus, the Court will examine the administrative record under the four *Michael F.* factors listed above to determine whether R.H.'s IEP was appropriate.[1]

1. Individualized IEP Based on Student's Assessment and Performance

The Court finds, by a preponderance of the evidence before it, that the IEP developed for R.H. was individualized for his needs. He was evaluated, observed, and assessed by PISD and a team of professionals, including a psychologist, speech therapist, an occupational therapist, and an

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[1] The Court notes that Defendant has argued that Plaintiff has waived any challenge to the conclusions as to some of these factors under 20 U.S.C. § 1415(i)(1)(A), but has provided argument on them nonetheless. Because the record is not wholly clear as to which portions of the Special Hearing Officer's findings Plaintiff has challenged, to ensure a full and fair analysis as to the ultimate conclusion that R.H.'s IEP was appropriate, the Court has evaluated the record under all four factors.

education specialist (A.R. III at 678-741; 748-787). Additionally, PISD gathered information from R.H.'s parents and teachers at TLC to formulate an appropriate plan for him. R.H.'s IEP was based on this assessment which, in light of the record here, appears to have been thorough and individualized. Indeed, the record contains hundreds of pages evidencing such evaluations and assessments. *(See, e.g.*, A.R. II at 210-347, III at 678-873).

Throughout the record there is evidence of meetings between parents and school officials, ARD committee meetings, and District meetings, regarding the plan for R.H. The formulation of R.H.'s IEP was a clearly constant and evolving process. In addition to various classroom accommodations, R.H.'s IEP indicated that he needed to be in an environment with a low student to staff ratio and that he needed direct one-on-one instruction while transitioning between activities (A.R. III at 697, 711; A.R. IV, Hearing Transcript II 144, 161). Further, it appears that, as R.H.'s parents raised any concerns about his progress, PISD would conduct additional evaluations and would consider any additional evaluations submitted by R.H.'s parents. Other than the District's failure to provide summer schooling for 2005 (which the special hearing officer held did not comply with IDEA and which will be addressed later in this report), there is nothing in the record to indicate the PISD failed to respond to R.H.'s individualized progress or needs with some sort of conference with school officials and parents and a corresponding revision to his IEP.

R.H's parents specifically contest those portions of the IEP regarding the proposed length of school day and the amount of individualized speech therapy. While his parents believe he needed more individualized speech therapy rather than the 15 minute sessions, coupled with 75 minutes group sessions recommended by the District, the record indicates that R.H. made some progress in his speech skills with even 60 minutes group therapy. Therefore, the Court does not find, under a preponderance of the evidence, that the District's recommendation regarding speech therapy was insufficient for R.H.'s specific needs.

In regards to the length of the school day, after R.H.'s parents expressed concern, the District specifically proposed to extend the length of each school day to include lunch time so that R.H.'s eating, textural, and feeding issues could be addressed by District personnel and therapists. Plaintiff has not shown how the District's refusal to lengthen the school day more resulted in a failure to address any other individualized needs. As noted above, to be in compliance with the IDEA, a school district is not required to provide an education that maximizes a student's potential. Therefore, by a preponderance of the evidence before it, the Court agrees with the Special Hearing Officer and finds that the 2005 IEP and the proposed educational program for 2005-2006 school year were individualized to R.H.'s needs in light of his assessment and performance.

2. Services Provided in Coordinated and Collaborative Manner by Key "Stakeholders"

As with the individualized IEP, the record indicates extensive participation in R.H.'s educational plan by various professionals within the District (A.R. III at 678-693). The District relied upon teachers certified in special education, speech pathologists, occupational therapists, and school psychologists, among others, to evaluate R.H.'s needs. Additionally, R.H.'s parents were active in the development of his IEP. There is nothing in the record to indicate that his well-being was not the primary objective of both the District and his parents or that the key stakeholders did not work together in developing a plan. Moreover, the record reflects an educational plan for R.H. that incorporated the input and collaboration on all of these individuals, including periodic reports to and conferences with R.H.'s parents regarding his progress. Therefore, the Court finds by a preponderance of the evidence, as did the Special Hearing Officer, that R.H.'s IEP was developed and implemented in a coordinated and collaborative manner by the key stakeholders.

3. Demonstration of Positive Academic and Non-academic Benefits

Unfortunately, R.H. attended Beaty for only one semester, so the time period that the Court has to evaluate his progress is rather short. And, the Court agrees with the District that the true extent of how much R.H. would benefit from the IEP is hampered by the fact that he did not stay enrolled at Beaty for

the full 12-month period the IEP was developed for. However, the record sufficiently indicates that R.H. made some progress during that short period (A.R. III at 693-94, 700, 720-721; A.R. IV, Hearing Transcript II, at 255-262; A.R. IV, Hearing Transcript III, at 16-24). The possibility that he did not make as much progress as his parents would hope, while certainly unfortunate, does not mean he did not demonstrate some positive benefits from the IEP, sufficient to show the District formulated an appropriate IEP for his needs. Having weighed the record before it, the Court finds this element was satisfied.

4. Program Administered in Least Restrictive Environment

Whether PISD's program was administered in the least restrictive environment, or LRE, appears to be the gravamen of Plaintiff's complaint here. The IDEA requires that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). Plaintiff argues that the decision of the Special Hearing Officer failed to comply with this provision and Fifth Circuit precedent. In *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989), the Fifth

Circuit developed a two-part test to determine whether Section 1412 has been complied with:

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. *See* § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate. *See id.* A variety of factors will inform each stage of our inquiry; the factors that we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases. Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.

Daniel R.R., 874 F.2d at 1048. Plaintiff argues that the District did not comply with this requirement. The Court disagrees.

Plaintiff claims that placement at Beaty was not in the LRE because R.H. would have been exposed to a greater number of non-disabled peers if he attended TLC. The least restrictive environment has been defined by the Fifth Circuit as "not only freedom

from restraint, but the freedom of the child to associate with his or her family and able-bodied peers to the maximum extent possible." *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 128 n.2 (5th Cir.1993) (emphasis added) (citations omitted). Plaintiff claims that "[a]lthough the least restrictive classroom option on the Beaty campus was recommended, this 'integrated' placement provided R.H. with greatly reduced exposure to his non-disabled peers compared to his regular education setting at TLC." Dkt. 38 at 4. Plaintiff cites to evidence in the record that the enrollment of students at Beaty fluctuated, such that, during some periods, only half of the students in any given class might be non-disabled. Plaintiff claims that TLC, on the other hand, had a significantly smaller percentage of disabled children in R.H.'s class.

However, the fact (or possibility as it appears in this case) that R.H. may have been in a classroom with a greater percentage of non-disabled peers at TLC does not mean that the Beaty classroom environment is not considered an LRE. Importantly, the Fifth Circuit has stated that "even when school officials can mainstream the child, they need no provide for an exclusively mainstreamed environment; the Act requires school officials to mainstream each child only to the maximum extent appropriate." *Daniel R.R.*, 874 F. 2d at 1045. Here, R.H. was placed in an integrated environment at Beaty where he was in a classroom with both disabled and non-disabled peers. Plaintiff has not shown that this integrated classroom – merely because it contained more disabled children than his at TLC – failed to provide him with a FAPE, and there is no magic number of

non-disabled peers a classroom must have in order to satisfy the IDEA. The Court agrees that the integrated classroom offered at Beaty was mainstreamed to the maximum extent appropriate.

The Court next addresses Plaintiff's allegation that PISD's failed to consider TLC as a possible LRE for R.H., including the District's purported failure to consider whether placement at TLC with supplemental aids would have been more appropriate. Plaintiff relies on some testimony by Beaty's principal that she did not consider TLC when determining the LRE for R.H. The Court need not reach what the record shows about whether TLC was considered by the District in order to find that the District provided him with a FAPE in the LRE. Even though a private school might be more appropriate or better able to serve a child, courts have found that school districts are not required to consider private placement as long as an appropriate public school program is available. *See, e.g., Michael F.*, 931 F. Supp. at 479. As correctly noted by one court,:

> [T]he proposition that a school district is required, as part of its assessment of how best to provide for a child's education, to canvass private schools for possible placements if so requested by the parents....is a faulty reading of IDEA. The law requires the district to evaluate the child's needs and to determine what is necessary to afford the child a FAPE. If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it

> place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if [the District], having identified the services needed by the child, concludes that those services can be provided in the public school.

W.S. ex rel. C.S. v. Rye City School Dist., 454 F. Supp.2d 134, 148 (S.D. N.Y. 2006).

It seems that Plaintiff's argument is premised on the assumption that TLC is a "regular" classroom and Beaty is not. The Court finds that the neither the record nor applicable case law make such a bright line distinction. The classrooms in both schools had both disabled and non-disabled children in them – though the ratio of disabled to non-disabled may have differed. The Court finds that, however way Beaty is characterized, the District's plan provided R.H. with supplemental aids and services — one of which may have well indeed been the placement of R.H. in a classroom with both disabled and non-disabled peers where he could both model appropriate behaviors and receive the extra services, attention, and therapies from trained care providers his disability merited — in the least restrictive manner. As recognized by the court in *Daniel R.R.*, a variety of factors determine whether a District has appropriately mainstreamed a child with disabilities. *Daniel R.R.*, 874 F.2d at 1048. The Court finds that

the placement at Beaty constituted a program administered in the least restrictive environment as required by the IDEA and the cases interpreting it.

Having examined this case under all four of the *Michael F.* factors, the Court, therefore concludes by a preponderance of the evidence that the record indicates that PISD's IEP for R.H. was reasonably calculated to enable him to receive meaningful educational benefits and thus provided him with a FAPE in accordance with IDEA. As noted above, because the Court has concluded that PISD did not violate IDEA in this case, the Court need not reach whether TLC was an appropriate private school placement.

Because the Court agrees that PISD complied with IDEA, Plaintiff is not entitled to reimbursement for the costs of TLC during the 2005-2006 school years. Although 20 U.S.C. § 1415(e)(3)(A) provides that "during the pendency of any proceedings conducted pursuant to this section, ... the child shall remain in the then current educational placement of such child," "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3)" *School Committee v. Department of Educ.*, 471 U.S. 359, 373-74, 105 S.Ct. 1996, 85 L. Ed.2d 385 (1985). Because PISD did not consent to R.H.'s transfer to

private school, his parents are not entitled to reimbursement for the cost of TLC for the 2005-2006 school year. *Houston Independent School Dist. v. Bobby R.*, 200 F.3d 341, 350 (5th Cir. 2000).

Notice Requirement for Summer 2005

In his complaint, Plaintiff alleges that the Special Hearing Officer erred as a matter of law by applying the IDEA notice requirement to bar reimbursement to Plaintiff for summer 2005. Plaintiff argues that the notice requirement applies only to a case in which a parent specifically refuses placement and that no placement was offered for Summer 2005 in this case. 20 U.S.C. § 1412(a)(10)(C)(iii).

As noted above, the Special Hearing Officer concluded that the District failed to provide R.H. with a FAPE for the Summer of 2005 because it failed to consider providing him with ESY during that period. It is undisputed that R.H.'s parents enrolled him in TLC for that period. When parents enroll their children in private schools without the consent of the school district, "a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C. § 1412(a)(10)(c)(ii).

Here, the Special Hearing Officer determined reimbursement was not warranted because Plaintiff did not comply with the notice requirements outlined in 20 U.S.C. § 1412(a)(10)(c)(iii) (A.R. at 14). Plaintiff

argues that these notice provisions did not apply to the denial of the 2005 summer session because no ARD meeting was ever conducted to specifically consider this session. However, Plaintiff does not cite any to legal authority or portions of the record to support his apparent argument that the denial of the 2005 summer session was not encompassed by the other ARD meetings and therefore not subject to the notice requirements. Therefore, the Court declines to find that the Special Hearing Officer erred in her findings regarding the notice requirements. In any event, the Court notes that regardless of the notice requirement, the reimbursement of costs under this section of the IDEA is within the Special Hearing Officer's discretion. 20 U.S.C. § 1412(a)(10)(c)(ii). The Court declines to find that the Special Hearing Officer abused her discretion in finding Plaintiff was not entitled to reimbursement here.

Attorney's Fees

Plaintiff seeks an award of attorney's fees here. Under the IDEA, a court may, in its discretion award attorney's fees to a parent of a child with a disability if that parent is found to be the prevailing party. 20 U.S.C. § 1415(i)(3)(B)(i)(I). The Court declines to find that such an award of attorney's fees is justified here because Plaintiff has not prevailed.

Costs

Finally, PISD seeks to recover its taxable costs of court under *Michael F.*, 118 F.3d at 256- 57. The Court declines to award costs to PISD under *Michael F.* While the Fifth Circuit did not expressly

disapprove of the district court's award of costs in that case, the court suggests that such an award was within the district court's discretion. Indeed, costs are recoverable under Rule 54 unless a "court order provides otherwise." FED .R. CIV. P. 54(d) The taxing of costs under 20 U.S.C. § 1920 is likewise discretionary. Further, the *Michael F.* court stated it did not disagree with the parents' equity-based arguments in opposing an award of costs. *Michael F.*, 118 F.3d at 257. Plaintiff makes similar arguments here.

The Court agrees with Plaintiff that the spirit, if not the express language, of the IDEA does not contemplate such an award of costs in favor of a prevailing school district. And, based on these facts, the Court declines to award the school district its costs.

Although the Court ultimately found in favor of the school district, R.H.'s parents here were well within their rights under the IDEA and their obligations as parents to ensure that their son is afforded all the opportunities available to him. R.H.'s parents were only seeking the best for their son. The Court finds that, absent clear authority mandating them to do so, they should not be required to take on additional financial burdens solely because they sought adjudication of this matter.

Recommendation

Based on the foregoing, the Court recommends that Defendant's Motion for Summary Judgment on the Administrative Record (Dkt. 15) be GRANTED, that

Plaintiff's Motion for Summary Judgment on the Administrative Record (Dkt. 38) be DENIED, that the findings of the Special Education Hearing Officer for the State of Texas in this matter be affirmed, and that each party should be ordered to bear its own costs and fees.

Within ten (10) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(c).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 7th day of March, 2008.

/s/ Don. D. Bush
Don D. Bush
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

R.H.. BY HIS PARENTS AND NEXT FRIENDS, EMILY AND MATTHEW H.	§	
Plaintiff,	§	CASE NO. 4:06cv352
v.	§	
PLANO INDEPENDENT SCHOOL DISTRICT	§	
Defendant.	§	

FINAL JUDGMENT

Pursuant to the Memorandum Adopting Report and Recommendation of United States Magistrate Judge filed in this matter, it is hereby

CONSIDERED, ORDERED, AND ADJUDGED that the final decision of the Special Education Hearing Officer is hereby **AFFIRMED** and judgment is **GRANTED** in favor of Defendant.

Each party shall bear its own costs, and all motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this the 31st day of March, 2008.

/s/ Richard A. Schell
Richard A. Schell
United States District Judge

APPENDIX C – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED MAY 27, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals Fifth Circuit
FILED
May 27, 2010
Lyle W. Cayce
Clerk

No. 09-40369

R.H., Unidentified Party, by His Parents and Next Friends;EMILY H., Unidentified Party; and MATTHEW H., Unidentified Party,

Plaintiffs-Appellants,

versus

PLANO INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before JONES, Chief Judge, SMITH and ELROD, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

R.H., a minor, appeals the denial of tuition reimbursement for private pre-schooling under the Individuals with Disabilities Education Act ("IDEA"). We affirm.

I. The IDEA.

Congress enacted the IDEA to ensure that children with disabilities will have access to public education, including special education and related services. *See* 20 U.S.C. § 1400(d)(1)(A); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989). The IDEA requires school districts in states receiving designated federal funds to implement procedures and policies that assure that each disabled student receives a "free appropriate public education," or "FAPE." 20 U.S.C. §§ 1412(a)(1), 1415(a). To ensure that a child receives a FAPE, parents and school districts collaborate to develop an Individualized Education Plan ("IEP") that is "reasonably calculated to enable the child to receive educational benefits."[1]

In Texas, a committee that develops an IEP is known as an Admissions, Review, and Dismissal ("ARD") Committee. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997). The ARD Committee consists of the parents of the child; at least one of his regular education teachers; at least one special-education teacher; a qualified representative of the school district; an individual who can interpret "the instructional implications of evaluation results;" other individuals who have knowledge or special expertise regarding the child (included at the discretion of the parent or agency); and, where appropriate, the child. V.P., 582 F.3d at 580 n.1 (citations omitted). The IDEA does not

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[1] *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583-84 (5th Cir. 2009) 1 (citation omitted), *cert. denied*, 78 U.S.L.W. 3546 (U.S. Mar. 22, 2010), *see also* 20 U.S.C. § 1415(b)(1).

entitle a disabled child to an IEP that maximizes his potential, but instead only guarantees a "basic floor" of opportunity "specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction." *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 (5th Cir. 2009) (citations omitted). The educational benefit, however, "cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement." *Id.* (citation omitted).

One of the primary mandates of the IDEA, and the central focus in this case, is "mainstreaming," which is the requirement that an IEP place a disabled child in the least restrictive environment ("LRE") for his education:

> In general[, t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). *See Daniel R.R.*, 874 F.2d at 1039.

"By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the [IDEA]," the requirement that a school district provide a FAPE on the one hand, and the requirement that, on the other hand, it does so within the least restrictive environment. *Id.* at 1044. "Even when school officials can mainstream [a] child," however, "they need not provide for an exclusively mainstreamed environment." *Id.* at 1045. Rather, "the [IDEA] requires school officials to mainstream each child only to the maximum extent appropriate. In short, the [IDEA]'s mandate for [FAPE] qualifies and limits its mandate for education in the regular classroom." *Id.* (citation omitted).

II. Factual Background.

R.H. was born in December 2001. At age two, he received an evaluation through Texas's Early Childhood Intervention ("ECI") program and was deemed eligible for ECI services, namely, speech and occupational therapy.

In June 2004, R.H. began attending TLC, a private preschool, and continued there until December of that year, when his parents convened with officials from Plano Independent School District ("PISD" or "the district") for an ARD committee meeting. At the meeting, R.H. was determined to qualify for IDEA services because of suspected autism and speech impairment. The ARD committee also developed R.H.'s IEP, which proposed placing him part-time in a class at Beaty Early Childhood School ("Beaty") that included both special education and typically

developing students. R.H. would also receive supplemental services, including weekly speech therapy sessions. His parents agreed to the IEP.

R.H. enrolled at Beaty in January 2005 and spent most of the spring semester there. The record reflects that, while at Beaty, he made some progress toward the goals listed in his IEP. Nevertheless, his parents became concerned that he was showing behavioral regression. During a parent-teacher conference in March 2005, they expressed concern about the perceived regression and stated their belief that R.H. needed summer school.

In May 2005, after receiving no response from PISD about their concerns, R.H.'s parents removed him from Beaty and re-enrolled him at TLC. By that time, the spring curriculum had ended at TLC, and R.H. participated in a less structured summer program, which a TLC employee referred to as "play time." R.H.'s teacher at TLC was not certified to teach in Texas public schools, was not certified in special education, and did not have a college degree. TLC did not have a speech or occupational therapist on staff. R.H.'s parents believed, however, that R.H. was better suited to be at TLC, in large part because the ratio of typically developing students to special education students was higher than at Beaty. During the summer, R.H.'s parents obtained private speech and occupational therapy for him.

At the end of the summer, PISD and R.H.'s parents held another ARD meeting to discuss modifications to the IEP. More ARD meetings followed throughout the fall, until January 2006. R.H.'s parents wanted

PISD to provide R.H. with a full day's schedule and 90 minutes of individual speech therapy and 30 minutes of group speech therapy each week. The district instead offered to lengthen R.H.'s school day from 2 hours, 45 minutes to 3 hours, 45 minutes, including supervised lunch time with other students to address some of R.H.'s difficulties with eating. The district also offered 15 minutes of individual speech therapy and 75 minutes of group therapy each week. As an alternative, the district offered a "dual enrollment" option, whereby R.H.'s parents could enroll him at TLC at their own expense but receive supplemental services at Beaty at no cost.

The parties could not reach an agreement. R.H.'s parents requested a due process hearing pursuant to the IDEA, which was held before a special hearing officer in April 2006. At the hearing, R.H. alleged that PISD had denied him a FAPE. Specifically, he alleged that, in developing his IEP, the district had failed to (1) consider the full continuum of placement options, including non-special education environments; (2) offer an appropriate educational program at Beaty during the spring of 2005; (3) place him in the LRE available for his education; and (4) provide him with extended-school-year education for the summer of 2005. R.H. requested reimbursement for his tuition at TLC and privately obtained speech, occupational, and physical therapy from May 2005 onward, as well as an order that PISD continue to pay for tuition and therapy until he began kindergarten in the fall of 2008.

The hearing officer found in favor of PISD on all but the extended-school-year claim. Although the hearing

officer found that the district had improperly denied R.H. services for the summer of 2005, she did not award reimbursement, because R.H. had failed to notify PISD of his intent to enroll at TLC during that period as required by 20 U.S.C. § 1412(a)(10)(C)(iii).

R.H. sued. Both parties moved for summary judgment after agreeing that the evidence in the administrative record was sufficient. The magistrate judge issued a report and recommendation in favor of affirming the ruling of the hearing officer. The magistrate judge found that R.H.'s IEP provided him with a FAPE, including an education in the LRE, and that R.H.'s failure to give notice under § 1412(a)(10)(C)(iii) barred reimbursement for tuition at TLC during the summer of 2005. Over R.H.'s objections, the district court adopted the report and recommendation.

On appeal, R.H. argues that his placement at Beaty violated the IDEA because it was not the LRE for his education and because PISD failed to follow certain procedural requirements of the IDEA. R.H. also contends that the notice requirement, which the district court held barred recovery for summer 2005 tuition, does not apply.

III. Standard of Review.

The district court, reviewing the decision of a hearing officer under the IDEA, accords "due weight" to the hearing officer's findings but ultimately reaches "an independent decision based upon the preponderance of the evidence" that is "virtually de novo." *Michael F.*, 118 F.3d at 252. We review the district court's

decision that the IEP's placement of R.H. at Beaty was appropriate under the IDEA *de novo* as a mixed question of law and fact.[2] The findings of underlying facts, "such as findings that a disabled student obtained educational benefits under an IEP," are subject to clear error review. *Id.* (citations omitted).

The role of the judiciary is not to second-guess the decisions of school officials or to substitute their plans for the education of disabled students with the court's. *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996) (citation omitted). Instead, the court's role is limited to determining whether those officials have complied with the IDEA. Id. (citation omitted). The IDEA creates a presumption in favor of a school district's educational plan, placing the burden of proof, by preponderance of the evidence, on the party challenging it. *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995) (citation omitted).

If there is a violation of the IDEA, we review the district court's decision not to grant tuition reimbursement for abuse of discretion. *St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 782-83 (5th Cir. 1998). Because we affirm the finding that PISD did provide R.H. with a FAPE, however, we need not review the denial of reimbursement.

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[2] *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000) (citation omitted); *see also Brillion v. Klein Indep. Sch. Dist.*, 100 F. App'x 309, 312 (5th Cir. 2004) ("In our view, compliance with the mainstreaming requirement presents a mixed question of law and fact, review is de novo . . . .").

IV. Tuition Reimbursement for the Regular School Year.

Tuition reimbursement for private education is a remedy available to courts and hearing officers where a school district fails to provide a child with a FAPE.[3] To receive reimbursement, R.H. must show that (1) his IEP's public placement at Beaty was inappropriate under the IDEA and (2) his private school placement--in this case, at TLC--was proper under the IDEA.[4]

We determine whether R.H.'s IEP appropriately placed him at Beaty by considering two additional questions. First, did PISD comply with the procedural requirements of the IDEA? And second, was the IEP "reasonably calculated to enable [R.H.] to receive educational benefits?" *Michael Z.*, 580 F.3d at 293 (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)).

A. Did PISD Comply with IDEA's Procedural Requirements?

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[3] "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C.§ 1412(a)(10)(C)(ii).

[4] *Michael Z.*, 580 F.3d at 293; *see also Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 12-13 (1993).

R.H. alleges three violations of the IDEA that could be construed as "procedural." He does not explicitly identify them as procedural, perhaps because the district court held that he had not alleged procedural violations in his complaint and had thus waived his right to pursue such claims. Though we are inclined to agree, we review R.H.'s procedural claims, assuming *arguendo* that they were properly raised.

The first such claim is that PISD failed to consider the harmful effects of placing R.H. at Beaty when developing his IEP, as required by "34 C.F.R. § 300.552(d)." That regulation no longer exists. R.H. gives us no information about whether it was effective at relevant times in the past. Because the claim is inadequately briefed, it is waived. *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001).

Even if we were to consider the argument, it is directly controverted by the record. R.H.'s IEP from December 2004 contains a standard subsection entitled, "Consideration of Potential Harmful Effects," which indicates that the ARD committee members--including R.H.'s parent--discussed the potential harmful effects of R.H.'s placement at Beaty.[5]

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[5] The potential harmful effects considered included lack of opportunity for appropriate role models, stigmatization, isolation from peers, diminished access to full range of curriculum, decreased student self-esteem, and decreased access to the instructional opportunities available in integrated settings.

R.H. also alleges that his IEP offered no "explanation of the extent, if any, to which [R.H.] w[ould] not participate with nondisabled children in the regular class," in violation of 20 U.S.C. § 1414(d)(1)(A)(i)(V). Again, the IEP controverts R.H.'s claim. It contains a standard section entitled "Committee Justification for Removal from the General Education," which explains that R.H.'s "needs/behaviors are such that he requires a full-time special education setting" but that he would still be part of a "General Education Campus" with "opportunity to participate with students without disabilities in all nonacademic and extracurricular activities to the maximum extent appropriate." Therefore, R.H. has not met his burden of proving a procedural violation in that respect.

Finally, R.H. claims his ARD committee violated the IDEA's procedural requirements because it did not consider placing him in a "regular," as opposed to special, educational setting with supplementary aids as needed. That argument dovetails with R.H.'s principal substantive claim, that his IEP was not reasonably calculated to deliver educational benefits, because it violated the LRE requirement of the IDEA. Because of that overlap, and because R.H. has not explicitly identified a distinct procedural claim in his briefing, we will consider this claim as part of his allegation that PISD violated the substantive LRE requirement of the IDEA.[6]

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[6]Citing *Daniel R.R.*, 874 F.2d at 1043, the district court noted that this circuit "has treated the failure to provide a continuum of educational services as a procedural, rather than substantive, violation of IDEA." *Daniel R.R.* is admittedly confusing on the procedural-versus substantive nature of the LRE requirement. One part of that opinion

B. Was the Substance of the IEP Reasonably Calculated?

We move from procedure to substance. The second question we address, in reviewing the appropriateness of R.H.'s placement at Beaty, is whether the substance of his IEP was "reasonably calculated to enable [him] to receive educational benefits." *Michael Z.*, 580 F.3d at 293.

1. The LRE Requirement in *Michael F.* and *Daniel R.R.*

At the outset, we must reconcile some of our precedent. We determine whether an IEP was reasonably calculated using the four factors identified in *Michael F.*, 118 F.3d at 253: (1) Is the program individualized on the basis of the student's assessment and performance; (2) is the program administered in the least restrictive environment; (3) are the services provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) are positive academic and non-academic benefits demonstrated?

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treats a school district's failure to provide a "continuum" of "alternative placements and supplementary services in conjunction with regular class placement" as a procedural violation. Id. (citation omitted). Another part, however, considers the question "whether the state has taken steps to accommodate the handicapped (continued...)

[6](...continued) child in regular education . . . [using] supplementary aids and services" as a substantive matter. Id. at 1048. For purposes of this case, however, we need not digress into the subtle distinctions between procedural and substantive LRE claims.

R.H. argues, however, that analysis under *Michael F.* is premature until we examine whether his IEP satisfies the statute's LRE requirement. He points to *Daniel R.R.*, 874 F.2d at 1045, in which we said the "two part inquiry"--looking first to procedural violations and second to whether an IEP was reasonably calculated--is "not the appropriate tool for determining whether a school district has met its mainstreaming [i.e., LRE] obligations." We then developed an independent test for satisfying the LRE requirement.

Michael F. and *Daniel R.R.* are not in conflict. *Michael F.* interpreted the LRE requirement as part of the FAPE requirement but did not alter *Daniel R.R.*'s framework for determining whether a school district satisfies the LRE requirement. Our analysis of the second *Michael F.* factor, then, is guided by Daniel R.R.

R.H. did not address the *Michael F.* factors in his briefing, insisting that only *Daniel R.R.* is relevant. As we have just explained, we consider his arguments as relating to the second *Michael F.* factor, whether the IEP satisfied the statute's LRE provision. As for the other *Michael F.* factors, nothing in R.H.'s briefing could be construed as challenging the district court's finding that PISD satisfied the first (individualized program) and third (stakeholder involvement) factors. R.H. does argue that he regressed during his time at Beaty, and this could be construed as a challenge to the district court's finding, under the fourth factor, that R.H. demonstrated positive academic and nonacademic

benefits under his IEP. We therefore review the district court's findings under the second and fourth *Michael F.* factors.

2. Standard of Review Under *Michael F.*

We review the district court's underlying factual findings under each of the four *Michael F.* factors for clear error.[7] We consider de novo any legal issues that arise under the four factors. V.P., 582 F.3d at 584.

3. *Michael F.* Factor Two: the LRE Requirement.

In *Daniel R.R.*, 874 F.2d at 1048, we stated a flexible, two-part test for determining whether an IEP's placement was in the LRE. "First, we ask whether education in the regular classroom, with the use of supplemental aids and services can be achieved satisfactorily for a given child." *Daniel R.R.*, 874 F.2d at 1048. "If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate." Id. At the outset of step one, "we must examine whether the state has taken steps to accommodate the handicapped child in regular education . . . . If the state has made no effort to take

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[7] V.P., 582 F.3d at 7 583 (reviewing the district court's findings under each *Michael F.* factor, including the LRE requirement, for clear error); *but see Brillion v. Klein Indep. Sch. Dist.*, 100 F. App'x 309, 312 (5th Cir. 2004) ("In our view, compliance with the mainstreaming requirement presents a mixed question of law and fact, [and] review is de novo.").

such accommodating steps, our inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education." *Id.*

R.H.'s central argument is that PISD fails *Daniel R.R.* step one (and thus, *Michael F.* factor two), because the district did not consider placing him anywhere except at Beaty. His class at Beaty, R.H. argues, is a "special education" setting, not a "regular" setting. It follows that PISD took no "steps to accommodate [him] in regular education," as required by the IDEA.

We disagree. The hearing officer found that PISD had considered placing R.H. in a fully mainstreamed environment but rejected that option. That finding was amply supported by evidence offered at the due-process hearing. Susie Vaughn, the principal at Beaty and a member of R.H.'s ARD committee, testified that the committee was aware of R.H.'s previous enrollment at TLC, but because of the needs identified in R.H.'s IEP--a low staff-to-student ratio, a special education teacher with knowledge of autism, regular collaboration with a speech pathologist--the committee could not be confident that the IEP could be implemented in a private school setting, without PISD's direct supervision.

At one point, Vaughn admitted that she personally "did not consider" whether R.H.'s IEP "could be implemented in a typical pre-school setting." But she later clarified, "I wouldn't say that it wasn't that we couldn't consider [implementing the IEP at a private preschool], because we obviously did consider it. It's that we didn't recommend it. We didn't advise that

because we couldn't assure that we could implement that IEP as written in that preschool setting."[8]

The picture that emerges from the due-process hearing transcript is of an ARD committee marshaling a range of resources and services to ensure R.H. a free appropriate public education. As the IEP developed, it seemed apparent to the committee members--including R.H.'s mother--that the best place to implement the plan was at Beaty. The ARD committee was well aware of R.H.'s previous experience in private preschool, but considering all his newly identified needs and newly offered resources, the committee did not recommend that he continue at TLC. The hearing officer thus concluded that R.H. had not met his burden to prove PISD failed to consider a full continuum of placement options.

The district court, giving due weight to the hearing officer's factual findings but still conducting an independent review, left that finding in place and found no violation of either the procedural or substantive requirements of the IDEA. *Michael F.*, 118 F.3d at 252. We review that underlying factual finding for clear error and find none. *Id.*[9] PISD

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[8] *See* Hearing Transcript 150-53, 224-25.

[9] R.H. argues that the clear-error standard of review is "not as heavy" here, because we stand in the same shoes as did the district court in reviewing the administrative record. *See Sicula Oceanica v. Wilmar Marine Eng'g & Sales Corp.*, 413 F.2d 1332, 1333 (5th Cir. 1969). The distinction is irrelevant, however, because, as our analysis above should make apparent, we would uphold the district court's finding that PISD satisfied *Daniel R.R.* step one even under a more stringent review.

satisfied *Daniel R.R.* step one by considering whether R.H.'s IEP could be satisfactorily implemented in a regular classroom.

We disagree, moreover, with R.H.'s rigid interpretation of *Daniel R.R.* step one, because he ignores an important factual distinction. In *Daniel R.R.*, the district had the option of placing the child in either of two pre-existing public classrooms: a regular pre-kindergarten class or a special education early childhood class. *Daniel R.R.*, 874 F.2d at 1039. R.H. asserts that "PISD offers no mainstream public classes for preschool children." In such a case, he argues, PISD was required to begin with the presumption that it would place him in "[t]he only mainstream placement available," a "'private' placement at a preschool for typically developing children," and remove him from the private setting only if it could not provide a satisfactory education there.

The IDEA, however, makes removal to a private school placement the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education.[10] Courts should therefore be cautious before holding

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[10] 20 U.S.C. § 1400(c)(2)(B) (finding that disabled children were being "excluded entirely from the public school system and from being educated with their peers"); *W.S. ex rel. C.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134, 148 (S.D.N.Y. 2006) ("Nothing in IDEA compels the school district to look for private school options if the [district], having identified the services needed by the child, concludes that those services can be provided by the public school.").

that a school district is required to place a child outside the available range of public options.

We do not read *Daniel R.R.* to flip the default of the IDEA in favor of a private school placement in this case. *Daniel R.R.* does not consider or speak to the circumstances at issue here, where the public preschool curriculum does not include a purely mainstream class. Since *Daniel R.R.* was decided, none of our decisions involving LRE analysis addressed facts remotely similar to those in this case.[11] A rigid application of *Daniel R.R.* step one, therefore, is not as helpful or persuasive as R.H. contends.

R.H. hangs his LRE argument on a threshold challenge to *Daniel R.R.* step one and has not advanced an alternative argument that PISD failed step two. Accordingly, we affirm the district court's finding that R.H. was mainstreamed to the maximum extent appropriate, and R.H. has not met his burden under *Michael F.* factor two to show that his IEP was not implemented in the least restrictive environment.

4. *Michael F.* Factor Four: Academic and Non-academic Benefits.

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[11] *See* V.P., 582 F.3d at 586 (concluding that mainstream placement for hearing-impaired child did not provide a FAPE under the circumstances presented there); Brillon, 100 F. App'x at 311-15 (stating that removing a second-grader from mainstream social studies and science classes because he could not keep pace with the curriculum did not violated the LRE requirement).

We move to the fourth factor under *Michael F.*, whether R.H. demonstrated positive academic and non-academic benefits under his IEP. Here again, we agree with the district court that the record has evidence that R.H. made sufficient progress during his one semester at Beaty to show that his IEP was providing a FAPE. R.H.'s teacher testified at the due process hearing, for instance, that R.H. had made progress in a number of areas, including shape recognition, counting, responding to his name, and socializing with other students.

According to R.H.'s parents, he was happier and developing better at TLC than at Beaty. As we have already explained, however, the IDEA does not entitle R.H. to a program that maximizes his potential. *Michael Z.*, 580 F.3d at 292. As long as PISD has provided R.H. with a "basic floor" of opportunity, "specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction," the district has fulfilled its obligations under the law. *Id.*

C. R.H.'s Placement at Beaty Did Not Violate the IDEA.

In summary, R.H. has not shown that PISD violated the procedural requirements of the IDEA, nor has he shown that his IEP was not reasonably calculated to enable him to receive educational benefits. It follows that the IEP's placement of R.H. at Beaty was not inappropriate under the IDEA, and R.H. is not entitled to tuition reimbursement for his time at TLC. We need not and do not decide, therefore,

whether TLC's school-year curriculum offered a proper private placement under the IDEA.

V. Tuition Reimbursement for Summer 2005.

In addition to normal school-year tuition reimbursement, R.H. seeks reimbursement for summer enrollment at TLC in 2005. As explained above, we analyze requests for reimbursement by asking first, whether the IEP's placement (or in this case, lack thereof) was appropriate under the IDEA, and second, whether the private school placement at TLC was proper under the statute. *Michael Z.*, 580 F.3d at 293.

The hearing officer held that PISD violated the IDEA when it failed to respond to the request of R.H.'s parents that the district provide an extended school year for R.H. in the summer of 2005. Nevertheless, the hearing officer held that reimbursement for R.H.'s enrollment at TLC that summer was inappropriate because R.H. had not given notice to PISD that he would be enrolled at TLC during that time period, as required by 20 U.S.C. § 1412(a)(10)(C)(iii). That part of the statute provides, in relevant part, that a court or hearing officer may reduce or deny an otherwise valid reimbursement request if

> at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the

> public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or . . . 10 business days . . . prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described [above].

20 U.S.C. § 1412(a)(10)(C)(iii)(I). The district court affirmed the denial of reimbursement.

On appeal, R.H. argues, as he did before the district court, that the notice requirement did not apply to him, because PISD never organized an ARD meeting specifically to address his request for an extended school year in 2005. He could not have possibly rejected the placement proposed by PISD per the notice requirement, when there was no summer placement proposal to reject in the first place.

We agree, instead, with the district court that the lack of extended school year services was part and parcel of R.H.'s IEP at the time he re-enrolled at TLC in May 2005, and he was thus required to give notice to PISD of his intent to reject the terms of his existing IEP. We note, moreover, that the decision to award private tuition reimbursement is a matter left to the discretion of courts and hearing officers.[12]

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[12] 20 U.S.C. § 1412(a)(10)(C)(ii) (stating that "a court or a hearing officer *may* require the [school district] to reimburse the parents for the cost of [private] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available") (emphasis added).

And even if we were convinced by R.H.'s argument that he was not required to give notice of enrollment at TLC for the summer of 2005, we are skeptical that he has met his burden to show that TLC was an appropriate private placement, worthy of reimbursement. The record reflects that TLC's regular curriculum ended in May 2005 and that the summer program was mere "play time."

VI. Conclusion.

PISD satisfied its obligations under the IDEA to develop an IEP for R.H. that offered him a FAPE during the school year. R.H. is barred from receiving reimbursement for private summer preschool tuition, because he did not give proper notice. R.H.'s request for attorney's fees is denied.

There is no error. The judgment is AFFIRMED.

APPENDIX D – PETITION FOR PANEL REHEARINGTO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 10, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

R.H., by his parents and next friends Emily and Matthew H.,	§	
Appellant	§	No. 09-40369 Civil Action No. 4:06-CV-00352
v.	§	
Plano Independent School District	§	
Appellee	§	

R.H.'S PETITION FOR PANEL REHEARING

Appellant R.H. files this Petition for Panel Rehearing pursuant to FRAP 40. The Fifth Circuit opinion issued on May 27, 2010 ("Opinion") contains several substantive errors of law and fact that warrant a different outcome. The overarching error in the Opinion is a failure to apply Daniel R.R. and the mainstreaming requirement of the IDEA, which may be caused in part by particular errors of fact, as set forth below.

Error 1: Reliance on a "finding" that does not exist

The Court mistakenly determined that "the hearing

officer found that PISD had considered placing R.H. in a fully mainstream environment but rejected that option." Opinion, p. 12. In fact, this finding does not exist anywhere in the hearing officer's opinion. See Amended Decision of Hearing Officer [Bates 39-1 Case: 09-40369 Document: 00511138811 Page: 1 Date Filed: 06/10/201052]. The District Court also failed to make this determination.[1] Such a finding is not found in the record and is a substantive mistake of fact because it serves as the cornerstone of the Court's analysis of the LRE requirement – the second Michael F. factor. This substantive mistake of fact also creates an unjustifiable burden for R.H. to defeat since "findings" of the hearing officer must be accorded due weight.

Error 2: Relying on documentation from the wrong year

On p. 9 of the Opinion, the Court states "the IEP"

[1] "The Court need not reach what the record shows about whether TLC was considered by the District in order to find that the District provided him with a FAPE in the LRE." Record Excerpt Tab 2, page 14 of R&R [ROA 704]. The D. Ct. did not comment on PISD's consideration of any other mainstream placement options. Accordingly, the D. Ct. erroneously made a determination about LRE without ever evaluating R.H.'s ability to be mainstreamed. How do we know what R.H.'s LRE is if we don't ask if he can receive a satisfactory education in a regular class?

controverts R.H.'s claim. However, there are two IEPs in the record, one developed in December 2004 to finish out the 2004-2005 school year (P. Exh. 2 [Bates 225-251]) and one for the 2005-2006 school year (last version developed in December 2005 at P. Exh. 22 [Bates 474-494]) which was never agreed to.[2] This lawsuit has only ever concerned the latter IEP, and the parents have only requested reimbursement from the summer of 2005 forward. Significantly, this Court mistakenly cites the December 2004 IEP for justification for removal from the general education, which states that R.H.'s "needs/behaviors are such that he requires a full-time special education setting." This is not the IEP that forms the basis of this lawsuit.

Although the December 2004 IEP is useful to show PISD's predetermination from the very beginning, the relevant December 2005 IEP pages are P. Exh. 22-9 – 22-11 [Bates 482-484]. Importantly, neither those pages nor any other pages in the relevant December 2005 IEP (or prior versions of this IEP for the 2005-2006 school year) include the language cited

[2] This IEP was never agreed to because it did not reflect R.H.'s present levels of performance or unique needs and abilities at that time as evidenced by his success in the regular classroom without many of the resources and services PISD continued to marshal to justify restricting him. See IEE excerpt at P. Exh. 18-14 [Bates 420] also at Record Excerpt tab 15.

by the Court or any other explanation/consideration at all. The cited language of the December 2004 IEP no longer appears since by December 2005, R.H. had been in a regular classroom with supplemental aids and services for 7 months at the parents' expense, and an Independent Educational Evaluation had been conducted that supported this regular classroom placement.[3] See Record Excerpt tab 15; P. Exh. 18 [Bates 407-424].

The child's placement must be determined at least annually. 34 C.F.R. 300.116(b)(1). The parents of disabled children do not have to prove a regular education environment is best for their children; rather, it is the school district's burden to explain in the IEP the extent to which a child cannot articipate in regular education activities. 20 U.S.C. § 1414(d)(1)(A)(iv). PISD failed to do this when it developed R.H.'s IEP for the 2005-2006 school year; it was error for this rt to find the IEP record defeats R.H.'s procedural and substantive allegations.

Error 3: Concluding there are no mainstream public preschool options

The Court mistakenly assumes that a private preschool was the only mainstream option.

[3] The IEE is a guaranteed procedural safeguard for parents that must be considered in any decision made with respect to the provision of FAPE. 34 C.F.R. § 300.502

This is factually wrong. Yet, this mistaken assumption leads the Court to the erroneous conclusion that Daniel R.R. and the LRE mandate of the IDEA do not apply, when this Court states at p. 14 of the Opinion that "Daniel R.R. does not consider or speak to the circumstances at issue here, where the public preschool curriculum does not include a purely mainstream class."

As discussed during oral argument, R.H.'s statement that "PISD offers no mainstream public classes for preschool children" reflects the lack of free public preschools since the compulsory school age for children in Texas is age 6. See Amended Hearing Officer decision at p.8. R.H. briefed mainstream preschool options aside from private school to this Court at p. 43 of his brief, and discussed these options during oral argument.[4] Moreover, R.H.'s parents were not requesting private school, but rather, a mainstream placement.[5]

[4] R.H. argued for other mainstream options to the D. Ct. as well. See, i.e., ROA 316; 583; see also ROA 512; 580.

[5] See PISD's notice of refusals at P. Exh. 11-1 [Bates 279] (parents requested natural ratio of typically developing peers to students with an IEP); P. Exh. 15-3 [Bates 347] (parents requested high volume of peers). A request for TLC is denied for the first time in January, 2006, after the parents requested other mainstream options from PISD for five months. See P. Exh. 19-4 [427].

Finally, it is undisputed that R.H.'s parents never approved the December 2005 IEP nor agreed that Beaty was appropriate, so the Court's statement in the Opinion at p. 13 that R.H.'s mother agreed that the best place to implement the plan was at Beaty is factually wrong.

The most important point is that PISD did have at least three mainstream preschool options at its disposal: regular kindergarten classes, Head Start, and PISD's Early Learning Centers.[6] This is not inconsistent with R.H.'s statement "that PISD offers no mainstream public classes for preschool children":
kindergarten classes are public but not typically for preschoolers; Head Start is community based and not run by PISD; and the Early Learning Centers are not free. But these are all regular settings that PISD can and should use to fulfill its LRE obligations for preschoolers who can be mainstreamed. The lack of free public preschool is not unique to PISD, and districts all over the country use regular kindergarten classes, community preschools, and Head Start to meet LRE for preschoolers. R.H. is not suggesting anything novel.

[6] Even if PISD were to now argue and this Court agree that the Early Learning Centers, regular kindergarten class, and Head Start would all be inappropriate placements for R.H., the violation of IDEA still occurred because PISD did not consider these when they were required to – during the development of R.H.'s IEP, with his parents who must be allowed to participate in all placement decisions. 34 C.F.R. § 300.327.

PISD's tuition-based Early Learning Centers present the most interesting option for PISD to mainstream preschoolers with disabilities as they are preexisting regular education classrooms for preschoolers in PISD and, in fact, one is closer to R.H.'s residence than Beaty. However, PISD never told R.H.'s parents about this option. During the due process hearing, R.H.'s counsel Myrna Silver asked the Beaty principal, Susie Vaughan, whether the district had tuition based alternatives for typically developing students. Ms. Vaughan gave false testimony by completely omitting discussion of PISD's Early Learning Centers.[7] See Vol. II, p. 206-207. However, at first glance, an Early Learning Center appears to provide an ideal mainstream environment for R.H., including the very low student/teacher ratio that PISD insisted R.H. needed only after suit was filed.[8] ROA 134 ¶ 20.[9]

There is no exception in the IDEA that if a "regular class doesn't exist" one may avoid application of mainstreaming laws. States are required to make available a "continuum of alternative placements"

[7] PISD's Early Learning Centers were available at the time R.H.'s 2005-2006 IEP was being developed (see P. Exh. 20-1 [Bates 000430]).

[8] See http://www.pisd.edu/schools/early.childhood/early.learning.shtml.

[9] "ROA" citations refer to the record on appeal which was Bates numbered by the District Court.

which must include regular classes. 34 C.F.R. § 300.115. PISD is either violating this law, or it is violating the law by not considering available mainstream options and instead automatically placing preschoolers with disabilities in special classes. It was error for this Court to disregard these options, which led to a misguided analysis of the law, and to a conclusion that is squarely at odds with Fifth Circuit and Federal law.

Error 4: Failure to determine R.H.'s ability to be mainstreamed

If a child with disabilities has the capability to be educated satisfactorily in a regular classroom, with the use of supplemental aids and services, then the school district must educate that child in a regular classroom. 20 U.S.C. § 1412(a)(5)(A). In determining whether a child can be educated satisfactorily in a regular classroom, with the use of aids and services, the lens is focused on the child.[10] This is consistent with the Federal mandate that "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" can the child be removed from the regular educational environment. Id. (emphasis added).

[10] The Fifth Circuit in Daniel R.R. evaluates in detail whether in a regular education setting the child can receive academic benefit; the child receives nonacademic benefit; and the child is disruptive to other children.

This Court and the school district mistakenly focus their lenses on the school facilities rather than on the child; they mistakenly ask whether the facility and personnel are capable of satisfactorily educating this child rather than whether the child has the capability to be educated in a regular classroom. To date, nobody – not PISD, the hearing officer, the District Court or this Court – has asked or answered the question of whether R.H. had the capability to be educated satisfactorily in a regular classroom, with the use of supplemental aids and services, at the time his second IEP was being developed for the 2005-2006 school year. This Court's focus on the school district's inabilities rather than on R.H.'s abilities is contrary to the Court's opinion in Daniel R.R. and handicaps a child such that the protections of the IDEA are worthless.[11]

Federal policy specifically forbids selecting a placement in a segregated setting over placement in a regular class if the placement decision is based on administrative factors and not on the student's needs. "In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs, and not solely on factors such as ... configuration of the service delivery system, availability of space,

[11] If we determine whether a child can be mainstreamed only in the context of the placements the school district chooses to offer, schools could always place preschoolers in special education placements by choosing not to offer regular placements.

or administrative convenience."[12] A school cannot use lack of appropriate placements as an excuse for denying students with disabilities their right to an education in the least restrictive environment.[13]

It light of the errors discussed above, it becomes clear that it was also error for this Court to fail to apply Daniel R.R. and ask first whether the child can be mainstreamed, based on his abilities and unique needs. Since the evidence proves he can be mainstreamed, the Court should then ask what public and private options provide this setting. With public options in this case, then PISD must either provide aids and services to accommodate the child in one of those options, or pay for private preschool.[14]

[12] Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12455, 12471 (1999).

[13] Federal Policy Letter on LRE, Education for the Handicapped Law Reporter (EHLR) page 211:384, March 21, 1986; CDE, Office of Special Education, Policy Statement on LRE.

[14] "There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims." Florence County Sch. Dist. v. Carter, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (emphasis added).

However, in no event is it permissible to restrict a child to a special class if his abilities are sufficient to receive a satisfactory education in a regular class with supplemental aids and services, and it was error for this Court toallow PISD to do so, as explained below.

As R.H. has argued, PISD placed him in a full-time special education classroom without first determining whether he had the capability to receive a satisfactory education in a regular classroom environment, which violates the IDEA.[15] 20 U.S.C. § 1412(a)(5)(A); Daniel R.R., 874 F.2d at 1048. The Court relies on the testimony of Beaty's principal, Susie Vaughn that "the committee could not be confident that the IEP could be implemented in a private school setting, without PISD's direct supervision." (emphasis added). This reliance is error first, because this is no evidence that R.H.'s IEP could not be implemented in PISD's Early Learning Centers, regular kindergarten classrooms,

[15] The after the fact justification given by PISD for rejecting the private preschool, as this Court noted, was due to its lack of confidence that it could implement an IEP in the private setting. In addition, an ESL pre-K classroom at Beaty was rejected as inappropriate for R.H., who needed appropriate speech models. Accordingly, it is crucial to recognize that PISD never rejected the possibility that R.H. could be accommodated in a regular classroom with the use of supplemental aids and services for the 2005-2006 school year; so nothing in the record defeats R.H.'s right under the IDEA to be educated in a regular classroom for this year.

or Head Start. Second, PISD's lack of confidence in implementing an IEP in a private preschool does not relieve it of its obligation to mainstream a child to the maximum extent appropriate.[16] 20 U.S.C. § 1412(a)(5)(A).

Further, Daniel R.R. sets forth factors to consider when determining whether a child can achieve education in the regular classroom satisfactorily – it is error that no reviewing Court has applied these factors in this case.[17] This analysis reveals there is no evidence that PISD took any steps to accommodate R.H. in regular education. Even if the Court believes that PISD "considered" the private preschool but just did not recommend it, what steps did PISD take to attempt to implement R.H.'s IEP in that setting? None.[18] The

[16] It is undisputed that R.H. was succeeding in a mainstream environment during the summer and fall of 2005. Why then is PISD permitted to make the leap from assuming a private regular class won't work, to placing him in full-time special education? This is not a continuum of placement options and this predetermination violates the letter and spirit of the IDEA.

[17] R.H. briefed these factors with evidence to the District Court, and to the Fifth Circuit in his opening brief. R.H. will not repeat the evidence again in this petition, as space does not permit.

[18] In another case, the Fifth Circuit found the school district had taken steps to accommodate the child in a regular education setting where it "modified the class assignments, provided a teacher's aide, and worked collaboratively to reinforce concepts" in that regular setting. Brillon v. Klein Independent School Dist., 100 Fed.Appx. 309, 312, (5th Cir. 2004).

ARD documents reveal that PISD assumed from the very beginning that R.H. needed a full-time special education classroom.[19] As the Court of Appeals for the Eleventh Circuit explained in Greer v. Rome, 950 F.2d 688, 698 (11th Cir. 1991), withdrawn for procedural reasons, 956 F.2d 1025 (11th Cir. 1992):

> [T]he critical inquiry is whether the school district took steps during the development of the IEP and placement proposal to accommodate Christy in the regular classroom; we will not consider after-the-fact justifications for a predetermined placement. Our review of the record convinces us that the school district, during the development of the IEP, did not take steps to accommodate Christy in the regular classroom. First, school officials failed to consider the full range of supplemental aids and services, including resource rooms and itinerant instruction, that could be provided to assist Christy in the regular classroom. ... Indeed, the school district's own minutes of the placement committee meetings indicate that school officials considered only three options for Christy: the regular classroom with no supplemental aids and services, the regular classroom with some speech therapy only, and the self-contained

[19] P. Exh. 2-14, 2-18 [Bates 238-242]; P. Exh. 14-12 [Bates 333]; P. Exh. 22-9 [Bates 482].

special education classroom. The school district's consideration of only these limited options does not comply with the mandates of the Act.

PISD failed to consider supplemental aids and services that would allow R.H. to receive his education in a regular setting; this violates Daniel R.R. step one and the IDEA. In order to accomplish the IDEA's mainstreaming requirements, schools must "hire various specially trained personnel to help handicapped children,"[20] such as physical, occupational, and speech therapists.[21] Additionally, a school district must assign a supplementary teacher's assistant to a regular classroom, on a full or part-time basis, if necessary to accommodate the special needs of included children with disabilities.[22]

With respect to the other Daniel R.R. step one factors, there is no evidence that R.H. would not receive educational benefit from regular education and, in

[20] Irving Independent School District v. Tatro, 468 U.S. 883, 893, 104 S.Ct. 3371, 3377, 82 L.Ed.2d 664 (1984).

[21] See Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 176 (3d Cir.1988), cert. denied, 488 U.S. 1030, 109 S.Ct. 838, 102 L.Ed.2d 970 (1989); 20 U.S.C. § 1401(a)(16).

[22] See, e.g., Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809, 813 (9th Cir.1983) (aide ordered for child with cystic fibrosis), cert. denied, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 260 (1985).

fact, with an IQ of 127 his academic skills exceeded those of his typical preschool peers as he was reading books to his classmates at TLC. Vol. II, p. 112. There is ample evidence that R.H. was not only fully capable of receiving educational benefit but that he was thriving from the regular education placement that his parents funded. There is also overwhelming evidence in this case that R.H. received enormous nonacademic benefits from mainstreaming which were central to his specific deficits such as a speech impairment, just as the Court in Daniel R.R. understood. Finally, there is ample evidence in the record that R.H. did not detrimentally affect the regular classroom environment.

Accordingly, not one, but all of the factors discussed at length in Daniel R.R. support the conclusion that R.H. could have received a satisfactory education in a regular class with supplemental aids and services. Yet PISD proposed only a fulltime special education classroom for R.H.[23] P. Exh. 14-12 [Bates 000333]; P. Exh. 22-9 [Bates 000482]. This alone is a violation of

[23] As previously briefed, PISD's offer of dual enrollment does nothing to defeat this argument since this would not only have been disruptive to transport R.H. during the day for only 15 minutes of individualized speech therapy, but this would have been a denial of FAPE, since R.H.'s parents would have been paying for his preschool. This would defeat IDEA's purpose of ensuring "that children with disabilities receive an education that is both appropriate and free." See Florence County Sch. Dist. v. Carter, 510 U.S. 7, 11, 13, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

the IDEA.

However, even if this Court rejects the evidence, and refuses to apply the step one factors, PISD is still liable for failing to mainstream R.H. to the maximum extent appropriate, pursuant to Daniel R.R. step two.[24] In this case, PISD had thebenefit of documentary and testimonial evidence of RH.'s success in a regular private class with occupational and speech therapy funded by his parents. PISD knew, at the time they were working with the parents to develop the December 2005 IEP, that R.H. was making progress on his IEP goals in a less restrictive setting than the full-time special education classroom they offered. This necessarily means the restrictive setting at Beaty did not mainstream him to the maximum extent appropriate, and it was error for the Court to disregard this violation.

[24] It was error for this Court to disregard Daniel R.R. step two. R.H. has argued extensively that he was not educated in the least restrictive environment, which is just another way of saying he was not mainstreamed to the maximum extent appropriate – Daniel R.R. step two.

Reimbursement

Although no court has yet reached the issue, R.H. is entitled to reimbursement because the parental placement at TLC was appropriate. Parents are entitled to reimbursement if: (1) there is a substantive violation of the IDEA; and (2) the education provided by the private school is reasonably calculated to enable the child to receive educational benefits.[25] Although the panel expressed concern about the lack of special education teachers at TLC, this does not justify a finding that TLC was not an appropriate unilateral placement. See 34 C.F.R. § 300.146(b) and 34 C.F.R. § 300.18(h). In Florence County, the district complained that the private school was inappropriate because faculty members were not state certified and it did not develop IEPs. The Supreme Court stated:

> [T]he § 1401(a)(18) requirements--including the requirement that the school meet the standards of the state educational agency, § 1401(a)(18)(B)--do not apply to private parental placements. Indeed,the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, "it hardly seems consistent with the Act's goals to forbid

[25] See Florence County, 510 U.S. at 15; see also Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

> parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place.

Florence County, 510 U.S. at 14 (citation omitted). Further, there is ample evidence in the record that TLC was appropriate due to his progress there.[26]

> [T]he parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell themseveral years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials.

[26] See Record Excerpt Tabs 10-12; 15; 17-18; 25; see also P. Exh. 13-16 [Bates 305-321] (FIE estates "he will likely" benefit from a low student to teacher ratio; all other recommendations can be implemented in the mainstream environment); P. Exh. 18 [Bates 407-423].

Burlington, 471 U.S. at 370. In this case, PISD violated the IDEA by failing to provide R.H. with an LRE.[27] In addition, it is undisputed and PISD has offered no evidence to the contrary that R.H. benefitted significantly, both academically and non-academically, from his mainstream placement. Therefore, the education provided at the private school, supported by the supplementary aids and services funded by his parents, is reasonably calculated to enable R.H. to receive educational benefits - the only standard for a unilateral placement when a school fails to provide the LRE. R.H. respectfully asks this Court to award reimbursement.

Conclusion

This case was not filed to require school districts to pay for private preschool. The private setting was the only mainstream option available to R.H. because PISD failed to offer, make available, or even consider any other mainstream alternative. R.H.

[27] If there is a substantive LRE violation, there is no need to determine if a FAPE was provided.K.B. v. Nebo School District, 379 F.3d 966, 975 (10th Cir. 2004). The IDEA requires both that the child be provided a FAPE and that such a FAPE be provided in an LRE to the maximum extent appropriate. Murray v. Montrose County Sch. Dist., 51 F.3d 921, 925-26 (10th Cir.1995).The IDEA's substantive provision is violated if a FAPE is provided, but not, to the maximum extent appropriate, in the LRE. See 20 U.S.C. § 1412(a)(1), (5); Murray, 51 F.3d at 925-26.

was limited by PISD to a single choice to obtain his education in a regular setting, which happened to be private, and he should not be penalized for this circumstance. This case was filed because a child with disabilities was not educated in the least restrictive environment, be it private or public, a substantive violation of the IDEA. There is no evidence in the record that R.H. could not receive a satisfactory education in a regular education classroom with supplemental aids and services for the 2005-2006 school year.[28] As a result, that is where he had the right to receive his education. 20 U.S.C. § 1412(a)(5)(A). The rules do not change just because the child is a preschooler or because a school district limits the placement options it offers.[29] R.H. can and did succeed in a regular education classroom with assistance – placing him in a full-time special education classroom was thus a blatant violation of the IDEA.

[28] "Indeed, the Act's strong presumption in favor of mainstreaming, 20 U.S.C. § 1412(5)(B), would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from regular classroom." Oberti v. Bd. Of Educ., 995 F.2d 1204, 1219 (3d Cir.1993).

[29] Not only did Daniel R.R. concern a preschooler, but the LRE requirement explicitly applies to all preschoolers with disabilities under Federal law. 34 C.F.R. § 300.116.

The undeniable result of the Opinion is that it is acceptable for R.H. to have been placed in a special education classroom even though his individual needs did not require that restrictive setting, because PISD assumed it could not implement his IEP in a private school and otherwise failed to consider any other mainstream options, much less with the provision of supplemental aids and services. R.H. can not envision a more straight forward violation of the IDEA's LRE requirement and R.H. respectfully requests a ruling in his favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 10, 2010 the following counsel of record for Appellee are being served with a copy of this document via the Court's

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APPENDIX E – ORDER DENYING PETITION FOR PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 25, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-40369

RH,UnidentifiedParty, by his parents and next friends; EMILY Unidentified Party; H, Unidentified Party,

Plaintiffs -Appellants

v.

PLANO INEDPENDENT SCHOOL DISTRICT,

Defendant -Appellee

Appeal from the United States District Court for the Eastern District of Texas, Sherman

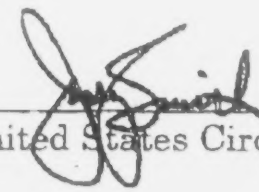
ON PETITION FOR REHEARING

Before JONES, Chief Judge, SMITH and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:



United States Circuit Judge

179

No. 10-436

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

R.H., BY HIS PARENTS AND NEXT FRIENDS EMILY AND MATTHEW H.,

Petitioner,

v.

PLANO INDEPENDENT SCHOOL DISTRICT

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Questions Presented by Petitioner R.H. ("R.H.") misrepresent the actual facts of the case and the Fifth Circuit's decision. Respondent, Plano Independent School District ("PISD") therefore provides its own.

1. The Individuals with Disabilities Education Act ("IDEA") obligates school districts to provide an eligible child with a disability with a free appropriate public education. Under the IDEA, the educational program provided to a child with a disability must be individualized to meet his or her unique needs. Additionally, children with disabilities must be educated in the least restrictive environment ("LRE") to the maximum extent *appropriate*.

The proper question presented here is whether the IDEA's LRE mandate requires a public school district to place, at public expense, a child in a private preschool setting that has been considered and rejected as inappropriate given the child's individualized needs, without regard to the fact that the public school placement offered for the child does not segregate him, includes age-appropriate instruction alongside children who are not disabled, and meets his individualized needs.

2. Whether the Supreme Court should review a decision that affirmed the concurrent findings of the Fifth Circuit and Hearing Officer that PISD considered TLC, a private preschool ("TLC") as a placement option but correctly determined that PISD's educational placement for R.H. at Beaty Early Childhood School ("Beaty") was the LRE appropriate for him given his individualized needs.

3. Whether the Supreme Court should review a decision when there are alternative grounds to support judgment in favor of the Respondent.

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STATEMENT OF THE CASE

R.H.'s "Questions Presented" and "Statement" are both misleading and inaccurate, as shown in greater detail below. The Respondent School District ("PISD") adopts by reference the Factual Background and Procedural History as stated by the Fifth Circuit. (Pet. 63a-69a). This case arises under the Individuals with Disabilities Education Act ("IDEA") and involves whether R.H. was provided a free appropriate public education ("FAPE") by PISD. The gravamen of R.H.'s complaint arises from his belief that PISD did not offer R.H. a FAPE because it allegedly refused to consider and place him at TLC, a private preschool setting, which R.H. claims was the least restrictive environment. The Special Education Hearing Officer, Magistrate Court, District Court and Fifth Circuit all disagreed with R.H., holding that PISD provided R.H. with a FAPE, in the least restrictive environment at Beaty. (Pet. 10a, 18a-19a, 21a, 24a-25a, 41a-56a, 60a, 71a-79a, 81a, 84a).[1]

R.H.'s petition fails to acknowledge that his placement at Beaty was driven by his individualized needs, as set forth in his Individual Education Program ("IEP"). The December 10, 2004 Admission, Review and Dismissal ("ARD") Committee, which included R.H.'s parent, determined that R.H. was a student eligible for special education services under the IDEA under the classifications of Non-Categorical Early Childhood, with

1. R.H. did not include as part of the Appendix the District Court's Order Adopting the Magistrate Court's Report and Recommendation. However, the Final Judgment confirms that it was adopted through its affirmance of the Hearing Officer's decision. (Pet. 60a).

a suspicion of autism and speech impairment. (Pet. 6a-7a, 66a). It was determined that R.H. needed one-to-one instruction during transition period, a low student to staff ratio and small-group instruction in order to learn new information, to reinforce and practice new information, and for independent practice and generalization of skills. (Pet. 8a, 47a, 77a). R.H.'s parent was a full participant in the ARD Committee process and agreed with its determinations. (Pet. 8a).

R.H. was placed at Beaty, a preschool program with both typically developing peers and students with disabilities in attendance. (Pet. 9a). R.H.'s classroom placement offered him education alongside both disabled and non-disabled peers. (Pet. 9a-10a; 52a). The three-year old classroom that R.H. attended was small, with a maximum enrollment of twelve students, with an opportunity for six students with IEPS and six typically developing peers. (Pet. 9a-10a). The four-year old classroom provided for R.H. had a maximum enrollment of fifteen students, with an opportunity for six students with IEPS and nine typically developing peers. (Pet. 10a). All of the teachers at Beaty were special education certified. (Pet. 10a). Beaty also had speech and language pathologists, teaching assistants, occupational therapists and physical therapists on campus. (Pet. 10a). The classroom for R.H. at Beaty included one classroom teacher, one teaching assistant and a speech and language pathologist that came on alternating days. (Pet. 10a). The Hearing Officer determined that the presence of the SLP at Beaty was important for R.H. to receive individual instruction from the SLP because communication disorder is a hallmark characteristic of autism spectrum disorder; thus the SLP should be in

the classroom on a regular, daily basis for an extended period of time. (Pet. 13a). R.H.'s classroom teacher at Beaty and the SLP worked closely together. The occupational therapist on staff at Beaty also assisted with strategies for R.H.'s eating issues during lunchtime with his peers. (Pet. 20a).

PISD was aware of R.H.'s previous attendance at TLC and although it was considered as a placement option, it was rejected due to his individual needs. (Pet. 77a-78a, 15a, 25a). The Hearing Officer's findings demonstrated that TLC could not provide a setting that would meet his individualized needs. The teacher to student ratio for R.H. at TLC was high; approximately 2:26. (Pet. 10a, 20a). R.H.'s teacher at TLC did not have a college degree, was not certified in special education or licensed to teach in Texas public schools. (Pet. 10a, 20a). TLC did not have any occupational therapists or speech therapists on staff, and no occupational therapists were available to assist R.H. during lunch at TLC. (Pet. 10a, 20a). The ARD documents reflected that R.H.'s parents did not believe that the teachers at TLC were trained to recognize sensory issues that affect his participation at lunch. (Pet. 20a). There was no collaboration between the TLC teacher and the key stakeholders in R.H.'s education. (Pet. 20a). The TLC teacher testified that she did not interact with R.H.'s private service providers. (Pet. 20a). Accordingly, the Hearing Officer determined that Beaty was the least restrictive environment for R.H. (Pet. 18a-20a). The Magistrate Court, District Court and Fifth Circuit agreed. (41a-56a, 60a, 71a-79a, 81a, 84a).

The Hearing Officer, Magistrate Court and District Court all determined that: (i) PISD developed an IEP for R.H. that was individualized on the basis of his assessment and performance; (ii) PISD provided services in a coordinated and collaborative manner; (iii) PISD administered the program in the least restrictive environment; and (iv) R.H. demonstrated academic and non-academic benefits. (Pet. 16a-21a, 46a-56a, 60a).

R.H. attended Beaty for the spring of 2005, progressed and received meaningful benefit. (Pet. 21a, 49a-50a, 81a). However, his parents unilaterally removed him from PISD and enrolled him at TLC for the following 2005-2006 school year. R.H. subsequently initiated a due process hearing requesting in part[2] that PISD reimburse R.H. for the costs of his private school placement at TLC for the 2005-2006 school year. Because PISD developed an IEP that was reasonably calculated to provide R.H. with an educational benefit and provide him with a FAPE in the least restrictive environment, the Hearing Officer, Magistrate Court and District Court all denied R.H.'s request for reimbursement. (2a-36a, 37a-59a, 60a). The Fifth Circuit affirmed the underlying decisions in full, finding that the IEP developed by PISD for R.H. was reasonably calculated to provide him with educational benefit and provided him with a FAPE in the least restrictive environment in conformity with the IDEA. (Pet. 71a-81a).

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2. R.H. also requested reimbursement for Extended School Year Services for the summer of 2005 which was denied due to his failure to comply with the IDEA's statutory notice provision, 20 U.S.C. § 1412(a)(10)(C). Although R.H. did not discuss this issue in his petition, this remains an alternative basis to support the Fifth Circuit's decision as shown below.

REASONS FOR DENYING THE PETITION

I. R.H. PREDICATES HIS PETITION ON LEGAL ARGUMENTS THAT FAIL TO ACKNOWLEDGE THE ACTUAL FINDINGS OF THE CASE.

Whatever value may be thought to exist in the questions presented by R.H., this is simply not the case to address such inquiries. R.H. completely abandons any attempt to honestly address the facts of the case. Instead, the legal arguments framed by R.H. in his request for review rest entirely on misleading, unsubstantiated presumptions. Indeed, although R.H. makes several factual representations within his petition, he completely fails to cite *even a single time* to any actual findings within the record appendix to corroborate any of his allegations. (Pet. 1-25).

R.H. likely is not forthright with respect to the facts of the case because he is aware that disagreements with the evidence are insufficient grounds for Supreme Court review. The Supreme Court does not grant certiorari to review evidence or discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925). Review depends on numerous factors other than the perceived correctness of the judgment below. *Ross v. Moffitt*, 417 U.S. 600, 617, 94 S.Ct. 2437, 2447 (1974). The Supreme Court will not grant a petition for writ of certiorari to review a decision on the grounds that the evidence was not sufficient to support the decision. *Southern Power Co. v. North Carolina Pub. Servs. Co.*, 263 U.S. 508, 509, 44 S.Ct. 164, 165 (1924). It is not warranted to grant a writ of certiorari to review evidence or inferences drawn from it. *General Talking Pictures*

Corp. v. Western Elec. Co., 304 U.S. 175, 178-89, 58 S.Ct. 849, 851 (1938). The Supreme Court Rules confirm that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. SUP. CT. R. 10. The Supreme Court therefore does not undertake to review findings of fact, in the absence of a very obvious and exceptional showing of error. *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 670, 87 S.Ct. 666, 670 (1967). Additionally, the fact that a question that might be hypothetical as to everyone else would be of great practical importance to litigants is ordinarily not a sufficient basis for granting certiorari. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122, 114 S.Ct. 1359, 1362 (1994). By failing to squarely engage the underlying factual findings, R.H. presents a hypothetical case for review that would not even be pertinent to the litigants here if certiorari was granted.

Specifically, the Fifth Circuit did not agree, as R.H.'s petition presumes, that PISD failed to properly consider alternative placement options for R.H. outside of PISD. The Hearing Officer rejected R.H.'s allegation that the District failed to consider a continuum of placement options. (Pet. 15a, 25a, 35a). The Fifth Circuit agreed with this determination as being amply supported by the evidence, noting that PISD was aware of R.H.'s previous enrollment at TLC, but rejected it because of the needs identified in his IEP. (Pet. 77a-78a).

R.H.'s petition also falsely assumes that TLC is the regular educational environment. R.H. fails to inform the Court that the Fifth Circuit rejected this same argument, stating, "[h]]is class at Beaty, R.H. argues, is a "special education" setting, not a "regular" setting. It follows that PISD took "no steps to accommodate [him] in regular education," as required by the IDEA. We disagree." (Pet. 77a). The Magistrate Court's report, adopted in full by the District Court, also rejected R.H.'s argument that TLC was the "regular classroom" and Beaty was not, stating:

> The Court finds that neither the record nor applicable case law make such a bright line distinction. The classrooms in both schools had both disabled and non-disabled children in them – though the ratio of disabled to non-disabled may have differed. The Court finds that, however way Beaty is characterized, the District's plan provided R.H. with supplemental aids and services – one of which may have well indeed been the placement of R.H. in a classroom with both disabled and non-disabled peers where he could both model appropriate behaviors and receive the extra services, attention and therapies from trained care providers his disability merited – in the least restrictive manner. (Pet. 54a).

The concurrent findings by the Magistrate Court and Fifth Circuit on this issue are supported by the law. The Department of Education declined a recommendation that it add language to the language concerning preschool children in 34 C.F.R. §

300.320(a)(5) by replacing the term "regular educational environment" with the phrase "settings with typically developing peers," stating:

> Section 300.320(a)(5)...applies to all children with disabilities covered by Part B of the Act, which includes preschool children...We do not believe it is necessary to change the regulations in the manner suggested by the commentator *because the 'regular class' includes a preschool setting with typically developing peers.*

Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46540, 46666 (Aug. 14, 2006) (codified at 34 C.F.R. pt. 300) (emphasis added).

The Department of Education also rejected recommendations to replace the term "regular education environment" with the term "regular classroom" in 34 C.F.R. § 300.114(a)(2)(ii), stating "regular educational environment encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate." 71 Fed. Reg. at 46585. The Department of Education refused to define "regular educational environment" to mean the regular classroom and the non-academic environment, stating it was unnecessary because:

> The LRE requirements in §§ 300.114 through 300.120, consistent with section 612(a)(5) of the Act, are clear that each public agency must ensure that, to the maximum extent appropriate, children with disabilities are

> educated with children who are nondisabled. 71 Fed. Reg. at 46585.
>
> The Department of Education further instructed:
>
> We believe that the LRE requirements in §§ 300.114 through 300.120 address the rights of children with disabilities to be educated in the LRE, as well as safeguard parental rights. Section 300.114, consistent with Section 612(a)(5) of the Act, requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 71 Fed. Reg. at 46585.

The Office of Special Education Programs acknowledged that neither the IDEA nor its implementing regulations define the term "regular classes" but noted that the IDEA establishes a presumption that children with disabilities will be educated in classes and setting with their nondisabled peers unless the education of children with disabilities cannot be satisfactorily achieved in those classes and settings with the use of supplementary aids and services. *Letter to Anonymous*, 104 LRP 1253, Office of Special Programs (July 23, 2003). However, the Office of Special Programs declined to agree that a "hybrid classroom," containing a percentage of disabled children greater than the natural percentage of disabled children in the general population of the school district was not a "regular class," concluding instead that "the IDEA does not limit the number, or percentage, of students with

disabilities that may be placed into a specific regular classroom in order to provide a free appropriate public education in the least restrictive environment." *Id.*

The guidance from the Department of Education and Office of Special Education Programs should be dispositive on this point. The IDEA authorizes the United States Department of Education, through its Office of Special Education Programs, to administer and carry out the IDEA, and charges the Secretary to enact the necessary regulations to ensure compliance with the IDEA and issue interpretations of its regulations. 20 U.S.C. § 1402(a); 20 U.S.C. § 1406. Reviewing courts must accord substantial deference to an agency's interpretation of its own regulations, giving it controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513, 114 S.Ct. 2381, 2386 (1994); *Irving v. Tatro*, 468 U.S. 883, 892, 104 S.Ct. 3371, 3373 (1984). In this case, R.H. cannot dispute that his placement at Beaty provided age-appropriate instruction alongside typically developing peers. R.H.'s petition thus presents a false case for review by assuming that TLC, and not Beaty, was the regular educational environment. The Magistrate Court and Fifth Circuit disagreed, and R.H. offers no facts or pertinent authority to the contrary that would merit Supreme Court review.

R.H. also misrepresents the case in alleging that the Fifth Circuit refused to apply a mainstreaming analysis, or otherwise limited its analysis to only public school settings, to the exclusion of TLC. A review of the Fifth Circuit's analysis easily dispels this misrepresentation. (Pet. 71a-81a). R.H. offers absolutely no citation to the

record to prove that the findings below were obviously and exceptionally erroneous or plainly without support to allow for Supreme Court review. At best, R.H.'s false presumptions only establish his personal disagreement with the factual findings of the Hearing Officer, Magistrate Court, District Court and Fifth Circuit. The Hearing Officer's factual findings in favor of PISD were affirmed by the Magistrate Court, the District Court, and the Fifth Circuit. (Pet. 41a-56a, 57a, 71a-79a, 81a, 84a). It is long-settled that concurrent conclusions of two courts below on the facts are accepted by the Supreme Court and will not ordinarily be disturbed. *Thomas v. Kansas City Southern Ry. Co.*, 261 U.S. 481, 484, 43 S.Ct. 440, 441 (1923); *Piedmont & George's Creek Coal Co v. Seaboard Fisheries Co.*, 254 U.S. 1, 12, 41 S.Ct. 1, 13 (1920). The Petition for Writ of Certiorari should be denied.

II. THE FIFTH CIRCUIT'S DECISION AROSE FROM A REVIEW OF R.H.'S INDIVIDUALIZED NEEDS, WHICH R.H. CANNOT DISPUTE.

The Fifth Circuit's holding that PISD provided an appropriate public placement for R.H. did not originate from a refusal to conduct a mainstreaming analysis or consider TLC as an option simply because it was a private preschool. Supreme Court review is not compelled here because the decision not to place R.H. at TLC arose from his individualized needs, as set forth in his IEP. (Pet. 8a, 47a, 77a). R.H.'s individualized needs cannot be ignored. The IDEA's LRE provision makes this explicit, directing that the educational placement of a child with a disability must be *appropriate*. 20 U.S.C. § 1412(a)(5)(A). In *Daniel R.R. v. State Bd. of Educ.*,

874 F.2d 1036 (5th Cir. 1989), the Fifth Circuit recognized that the requirement to provide a LRE does not supersede the District's obligation to provide each student with a FAPE, stating, "the Act's mandate for a free appropriate public education *qualifies* and *limits* its mandate for education in the regular classroom." *Daniel R.R.*, 874 F.2d at 1045 (emphasis added).

The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services *designed to meet their unique needs* and prepare them for employment and independent living. 20 U.S.C. § 1400(d)(1)(A) (emphasis added). To satisfy this purpose, schools are required to identify children with disabilities and develop an IEP for each child. 20 U.S.C. § 1414. The IDEA defines FAPE as special education and related services that: (i) have been provided at public expense, under public supervision and direction and without charge; (ii) meet the standards of the State educational agency; (iii) include an *appropriate* preschool, elementary or secondary school education; and (iv) are provided *in conformity with the individualized education program developed*. 20 U.S.C. § 1401(9) (emphasis added). "Special education" means *specially designed instruction*, at no cost to parents, to meet the *unique* needs of a child with a disability. 20 U.S.C. § 1401(29) (emphasis added). A child receives a FAPE when the program: (i) address the child's unique needs; (ii) provides adequate support services so the child can take advantage of educational opportunities; and (iii) is in accord with the IEP. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S.

176, 188-189, 102 S.Ct. 3034 (1982). The IEP is therefore the "centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597-98 (1988).

To accept R.H.'s argument here would impermissibly disregard his IEP and the individual needs it addressed. The Hearing Officer determined that R.H.'s placement at Beaty for the spring 2005, along with the proposed educational program for the 2005-2006 school year was appropriate and individualized on the basis of his assessment and performance. (Pet. 18a). R.H.'s IEP determined that he needed one-to-one instruction during transition periods, a low student to staff ratio and small-group instruction in order to learn new information, to reinforce and practice new information, and for independent practice and generalization of skills. (Pet. 8a, 47a, 77a). The Magistrate Court and District Court agreed that the IEP was appropriately individualized. (Pet. 46a-48a). It was these individual needs that led to the determination that Beaty, not TLC, was the least restrictive environment appropriate. (Pet. 18a-20a, 46-55a, 78a).

R.H. cannot dispute these facts now. The Fifth Circuit noted that nothing in R.H.'s briefing could be construed as challenging the District Court's finding that PISD satisfied the requirement that his IEP be developed to meet his individualized needs with services to be provided in a coordinated and collaborative manner by the key stakeholders. (Pet. 75a). R.H. therefore cannot now contest the sufficiency of the IEP or the individualized needs stated therein. The Supreme Court is a court of final review, not first view. *Fed.*

Communication Comm'n v. Fox Television Stations, Inc., __ U.S. ___, 129 S.Ct. 1800, 1819 (2009) (holding that when the Circuit Court did not rule on the constitutionality of the Commission's orders, the Court would not entertain a request by the respondents to decide their constitutional validity). When a question or issue is not raised below, it is not open for consideration in proceeding on petition for certiorari. *Ellis v. Dixon*, 349 U.S. 458, 460, 75 S.Ct. 850, 852 (1955). These factual findings should also be accepted by the Supreme Court as they were concurrently confirmed by the Magistrate Court, District Court, and Fifth Circuit. (Pet. 41a-57a, 71a-79a, 81a, 84a).

The Fifth Circuit directly disagreed with R.H.'s contention that PISD had not considered placing R.H. at TLC; discussing that the basis for its rejection as a placement option arose from R.H.'s individual needs as set forth in his IEP. (Pet. 77a, 78a). The Fifth Circuit explained:

> The picture that emerges from the due-process hearing transcript is of an ARD committee marshaling a range of resources and services to ensure R.H. a free appropriate public education. As the IEP developed, it seemed apparent to the committee members–including R.H.'s mother–that the best place to implement the plan was at Beaty. The ARD Committee was well aware of R.H.'s previous experience in private preschool, but considering all his newly identified needs and newly offered resources, the committee did not recommend

> that he continue at TLC. The Hearing Officer thus concluded that R.H. had not met his burden to prove PISD failed to consider a full continuum of placement options. (Pet. 78a).

The Fifth Circuit agreed with the Hearing Officer and District Court's determination on this issue, finding no clear error. (Pet. 78a).

R.H. thus misrepresents the reasoning behind the Fifth Circuit's decision. R.H. postures this case as one of great importance because the Fifth Circuit refused to apply a mainstreaming analysis for R.H., a preschool child. Even a cursory review of the decision reveals that the Fifth Circuit carefully applied the mainstreaming analysis in the full context of determining whether PISD's offered educational program for R.H. provided him with a free *appropriate* public education. (Pet. 71a-81a). The Fifth Circuit did not, as R.H. misrepresents, deny R.H.'s requested relief because it either refused to conduct a mainstreaming analysis or made a blanket determination that a private school program could never serve as an appropriate placement for a preschool child.

Nothing within the Fifth Circuit's decision establishes the precedent suggested by R.H. The Fifth Circuit's ancillary discussion of private school placements only rejected R.H.'s "rigid interpretation" of *Daniel R.R.* and was limited to the facts of the case, stating, "[w]e do not read *Daniel R.R.* to flip the default of the IDEA in favor of a private school placement *in this case*." (Pet. 80a) (emphasis added). Indeed, the Fifth Circuit's disagreement with R.H.'s assertion that TLC must be the default regular educational environment in

this case only came *after*[3] it undertook a full analysis of R.H.'s individualized needs and determined that not only had PISD satisfied step one of the *Daniel R.R.* analysis[4] but also found no clear error in the Hearing Officer and District Court's findings that PISD had not violated either the procedural or substantive requirements of the IDEA. (*Compare* Pet. 71a-79a with 79a-80a). The Petition for Writ of Certiorari should be denied.

III. THERE IS NO SPLIT AMONGST THE CIRCUIT COURTS.

R.H. attempts to manufacture a split amongst the Circuit Courts that does not exist on the facts of this case. The split that R.H. suggests exists between the Fifth Circuit and the Third, Seventh and Tenth Circuits presumes that these other Circuit Courts have adopted a rigid test favoring private placement when preschool children are involved. This argument ignores that each of the cases from the Third, Seventh and Tenth Circuits cited by R.H. arrived at a decision that private placement

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3. Only after finding that PISD satisfied step one of *Daniel R.R.* and that there was no clear error in the underlying decisions, did the Fifth Circuit go on to say, "[w]e disagree, moreover with R.H.'s rigid interpretation of *Daniel R.* step one..." (Pet. 79a).

4. The Fifth Circuit determined that R.H. failed to alternatively argue that PISD had failed step 2 of the *Daniel R.R.* analysis. (Pet. 80a). R.H. cannot present it now as a basis for Supreme Court review. *See Rogers v. Lodge*, 458 U.S. 613, 628, 102 S.Ct. 3272, 3281 (1982) (stating that the Supreme Court does not consider contentions that are not raised before a court of appeals and consequently not addressed by that court).

was appropriate only after carefully analyzing the individual needs of the student. None of these Circuit Courts suggested a blanket rule that private placement must be considered as the regular educational environment or otherwise provided for preschool children, without regard to their particular needs. The nonexistence of any conflicting blanket rule is best demonstrated by the fact that both the Third and Tenth Circuit have considered preschool placements since the rendition of the decisions cited by R.H., and upheld public preschool placements for children with disabilities over private preschool placements. *See Sytsema ex. rel. Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008); *M.S. v. Mullica Tp. Bd. of Edu.*, 263 Fed. Appx. 264 (3rd Cir. 2008).

Federal Circuit Courts recognize that the LRE analysis is necessarily fact-intensive, requiring careful analysis of the particular child's needs and abilities. *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 448 (9th Cir. 2010); *P. v. Newington Bd. of Ed.*, 546 F.3d 111, 119 (2nd Cir. 2008); *Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262, 1277 (10th Cir. 2007); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1214 (3rd Cir. 1993); *Daniel R.R.*, 874 F.2d at 1048. This analysis arises from the direct text of the IDEA requiring an IEP designed to meet a child's unique needs in an appropriate placement. *See* 20 U.S.C. §§ 1401(29); 1412(a)(5); 1414(d); The Department of Education confirms this approach as well. 71 Fed. Reg. at 46587 (instructing that placement decisions must be made on an individual basis and the requirement for the continuum of alternative placements "reinforces the importance of the individual inquiry, not a 'one size fits all' approach in determining what placement is the LRE for each child with a disability.").

The fact-specific inquiry employed by courts proves that the fundamental distinctions that exist between the case at bar and the authorities cited by R.H. do not create any conflicts that merit Supreme Court review. These cases are distinguishable. R.H.'s citation to *T.R. v. Kingwood Township*, 205 F.3d 572 (3rd Cir. 2000), fails to inform the Court that this decision was rendered prior to the United States Supreme Court's decision in *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005), and placed the burden of demonstrating compliance with the IDEA on the school district. *See L.E. v. Ramsey Bd. of Edu.*, 435 F.3d 384, 391 (3rd Circuit 2006). The Third Circuit subsequently recognized its prior application of the burden of proof in *Kingwood Township* and specifically rejected continued placement of the burden upon school districts in light of the *Schaffer* decision. *L.E.*, 435 F.3d at 391.

Regardless, the basis for finding error and remanding the underlying district court's decision for further consideration in *Kingwood Township* rested with the fact that the district court did not address the student's specific needs, there was no evidence that the student could not have been educated satisfactorily in a "fully-mainstreamed" preschool class, and the district court did not inquire into whether appropriate regular classroom options outside the school district were available. *Id.* at 578-580. This case has widely different facts. TLC was considered by both the school district and the hearing officer, but given R.H.'s individual needs, as set forth in his IEP, Beaty was determined to be the LRE appropriate. (Pet. 18a-20a, 46-55a, 78a).

Kingwood Township actually refutes R.H.'s central argument. In *Kingwood Township*, the Third Circuit held that the school satisfied its burden to establish that the placement of the student in a "hybrid" preschool program composed of half students with disabilities and half students without disabilities provided a FAPE. *Kingwood Township*, 205 F.3d at 577. The Third Circuit cited to *Florence County Sch. Dist. v. Shannon Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993), and held that *Shannon Carter* did not require reimbursement where both the state-chosen school and the parent-chosen school would provide a FAPE, even when the parent-chosen school would arguably provide a less restrictive environment. *Kingwood Township*, 205 F.3d at 581-82. The Third Circuit stated:

> Extending *Florence* to these circumstances would require a state to ensure the maximally optimal LRE placement for each child, even if such a placement is not available in any qualifying school within a reasonable distance. *Florence's* own language forecloses such an interpretation. *Florence* gives parents the right to reimbursement for a unilateral placement in a non-qualifying school only 'if a federal court concludes both that the *public placement violated IDEA* and that the private school placement was proper under the Act. *Id.*

The Third Circuit further held that the public school district did not even have to consider placement in the private preschool, Rainbow Rascals, because it was not properly accredited under New Jersey law. *Kingwood Township*, 205 F.3d at 580. Additionally, the school

district in *Kingwood Township*, did not offer a regular preschool program for non-disabled children. *Kingwood Township*, 205 F.3d at 576. The Court in *Kingwood Township* also determined as a substantive matter that the private program could have provided a FAPE to the student in question, which is not consistent with the Hearing Officer's findings regarding R.H.'s individualized needs and TLC's deficiencies. (Pet. 18a-20a); *Kingwood Township*, 205 F.3d at 580. Additionally, R.H. fails to acknowledge that the Third Circuit in *Kingwood Township* agreed that the IDEA did not contemplate an all-or nothing educational system in which children with disabilities attend either regular or special education. *Kingwood Township*, 205 F.3d at 579.

R.H. also claims that this case conflicts with the Seventh Circuit's decision in *Board of Edu. of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Edu.*, 184 F.3d 913, 916-917 (7th Cir. 1999). This case is similarly distinctive, and not conflicting. In *LaGrange*, the school district recommended placing the student in a program limited to disabled students, in a different school district. *LaGrange*, 184 F.3d at 913. The second program offered by the school district for placement was an "at-risk program" for students at risk of academic failure. *Id.* The Seventh Circuit agreed that these placements did not constitute the least restrictive environment, particularly considering the deference owed to the underlying hearing officer's conclusion that the individual needs of the student could be met in a lesser restrictive environment. *LaGrange*, 184 F.3d at 916-917. Here, R.H. was not offered a program limited only to disabled students or at-risk students, nor did the Hearing Officer agree that R.H.'s individual needs could be met at TLC. (Pet. 18a-20a).

In *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004), the facts demonstrated that the public school placement consisted of a predominately disabled and gender-imbalanced student body such that it would have been an inappropriate placement for the female student at issue given her need to improve her social skills. *Nebo*, 379 F.3d at 973. The facts in the record in *Nebo* also established that the private school was better suited to meet the student's behavioral and social needs. *Nebo*, 379 F.3d at 978. The facts in this case are dissimilar, and any complaint that R.H. may wish to contest with the factual findings that PISD's placement of R.H. at Beaty was the LRE appropriate given his individual needs is simply unworthy of further review by the Supreme Court. There is no split here; each of the cases that R.H. claims conflict with this case cited favorably to *Daniel R.R.* and utilized the sane two-part test enunciated by the Fifth Circuit there. *See Kingwood Township*, 205 F.3d at 579; *Nebo*, 379 F.3d at 977; *LaGrange*, 184 F.3d at 915. Nor did the case at bar overrule the Fifth Circuit's *Daniel R.R.* test; it directly applied it in determining that PISD had satisfied the LRE mandate. In sum, R.H.'s alleged inter-circuit conflict is more illusion than substance, at least as it concerns this case. The Petition for Writ of Certiorari should be denied.

IV. R.H.'S ARGUMENT, IF ACCEPTED, WOULD INVADE PISD'S SOVEREIGN IMMUNITY AND VIOLATE THE SPENDING CLAUSE.

R.H. asks the Court to define private schools as the "regular educational environment" for preschool children, thus requiring public school districts to place preschool children in private schools and be liable for

the private preschool expenses unless it can otherwise prove that "removal" into the public school system is justified. This argument seeks to overturn the narrow rules of construction regarding waivers of sovereign immunity and further turn the Spending Clause presumption on its head.

The IDEA is a waiver by the government of its sovereign immunity. Any waiver of sovereign immunity must be strictly construed in favor of the governmental entity. *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 135, 112 S.Ct. 515, 520 (1991). The Supreme Court recognizes that "[l]ike a waiver of immunity itself, which must be unequivocally expressed... this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 160-61, 101 S.Ct. 2698, 2701-02 (1981). A waiver of sovereign immunity must therefore be unequivocally expressed, with all uncertainties resolved in favor of the governmental entity. *Boehms v. Crowell*, 139 F.3d 452, 463 (5th Cir. 1998). The Supreme Court acknowledged the limited nature of the waiver of sovereign immunity under the IDEA, ruling that a waiver of immunity under the IDEA must be made knowingly, such that any conditions imposed upon a governmental entity be unambiguous. *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 294-304, 126 S.Ct. 2455, 2459-2464 (2006).

The Supreme Court repeatedly emphasizes that when Congress places conditions on the receipt of federal funds, it must do so unambiguously. *Pennhurst*

State School and Hospital v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793 (1987); *New York v. United States*, 505 U.S. 144, 158, 112 S.Ct. 2408 (1992). A law that conditions an offer of federal funding on a promise by the recipient "amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989 (1998). Accordingly, the "legitimacy of Congress' power to legislate under the spending power ... rests on whether the State voluntarily and knowingly accepts the terms of the contract. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 415 U.S. at 17. (citations omitted). In *Rowley*, the Supreme Court recognized that Congress did not intend to impose upon the States a "burden of unspecified proportions and weight" in enacting the IDEA. *Rowley*, 458 U.S. at 190, 102 S.Ct. at 3042.

The IDEA was enacted by Congress pursuant to the Spending Clause. U.S. CONST., ART. I, §8, CL. 1; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In *Murphy*, the Supreme Court repeated these rules of construction, ruling that since the IDEA was enacted pursuant to the Spending Clause, any conditions imposed upon the acceptance of federal funds must be spelled out unambiguously and that States could not be held to knowingly accept conditions of which they were unaware or unable to ascertain. *Murphy*, 548 U.S. at 296, 126 S.Ct. at 2459. The central inquiry for the *Murphy* Court was whether the IDEA furnished a state official deciding whether to accept IDEA funds with

notice that one of the obligations imposed upon such acceptance would be the obligation to compensate prevailing parties for expert fees. *Id.* In *Murphy*, the Supreme Court rejected the argument that expert fees should be interpreted to be part of the costs that could be recovered under 20 U.S.C. § 1415(i)(3)(B), concluding that neither the plain language of the IDEA, nor the Court's previous rulings on the meaning of the term "costs" could provide the clear notice required to attach such a condition to the receipt of IDEA funds. *Murphy*, 548 U.S. at 294-304, 126 S.Ct. at 2459-2464.

To agree that a public school district must consider a private preschool as the regular educational environment and place a child at a private preschool at public expense unless it can first justify "removal" into the public school system would violate the Spending Clause of the United States Constitution, and step outside the strict construction when sovereign immunity is at stake. *Murphy*, 548 U.S. at 294-304, 126 S.Ct. at 2459-2464 (2006). Neither state nor federal law notifies school districts that a condition of accepting federal funds under the IDEA includes the obligation to first consider private placements for preschool children, without regard to whether an appropriate public placement exists. Neither state nor federal law notifies school districts that for preschool children, the "regular educational environment" is the private preschool chosen by the parents or that the public school should be considered "separate schooling." Neither state nor federal law notifies school districts that for preschool children, a private placement must be made if it can purportedly offer a lesser restrictive environment, even if it is not appropriate for the individualized needs of the student.

The IDEA's provisions do not unambiguously and clearly place school districts on notice that R.H.'s arguments here are correct. In fact, the IDEA informs school districts that they are not required to pay for the cost of education for a child with a disability if that agency made a FAPE available to the child and the parents elected to place him in a private school. 20 U.S.C. § 1412(a)(10)(C)(i). Congress also expressly found that one of the Act's purposes was to address the fact that prior to its enactment, "children were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2)(B). Congress further noted that prior to the Act, "a lack of adequate resources within the public school system forced families to find services *outside* the public school system." 20 U.S.C. § 1400(c)(2)(D) (emphasis added).

Congress' intent in promoting public placements for children with disabilities extends back more than forty years. In *Rowley*, the Supreme Court reviewed the legislative history, noting that Congress first addressed the problem of educating children with disabilities through grant programs enacted in 1966, and again in 1970. *Rowley*, 458 U.S. at 180, 102 S.Ct. at 3037; *see also* Pub. L. 89-750, § 160, 80 Stat. 1204; Pub. L. 91-230, 84 Stat. 175. The Supreme Court noted that neither of these two Congressional enactments contained specific guidelines for state use of the grant money and consequently was dissatisfied with the progress made. *Id.* In 1974, Congress was motivated to bring access to a public education for children with disabilities and therefore greatly increased federal funding, requiring for the first time that recipient States "adopt a goal of providing full educational opportunities to all

handicapped children." *Id.*; *see also* Pub. L. 93-380, 88 Stat. 579, 583. Following a comprehensive review of Congressional enactments, the Supreme Court found that "the face of the statute evinces a congressional intent to bring previously excluded handicapped children *into* the public education systems of the States and to require the States to adopt procedures which would result in individualized consideration of and instruction for each child. *Rowley*, 458 U.S. at 189, 102 S.Ct. at 3042. (emphasis added).

The Supreme Court has also noted the preference for public school placement. *Town of Burlington v. Dep't. of Edu.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002 (1985) (stating the IDEA therefore "contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense where this is not possible."); *Rowley*, 458 U.S. at 189, 102 S.Ct. at 3042 ("[t]he Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that 'mainstreaming preference' has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors educational progress of the child.").

Circuit Courts similarly deny that parents have a right to services to be provided at a private school. *See KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1049-1050 (9th Cir. 1999) (finding that every Circuit Court that had considered whether the IDEA required services to be

provided on site at a private school concluded that it had not); *Foley v. Special Sch. Dist.*, 153 F.3d 863, 865 (8th Cir. 1998) (holding that the parents had no right to a federal decree that services be provided at a particular location); *Cefalu v. East Baton Rouge Parish Sch Bd.*, 117 F.3d 231, 233 (5th Cir. 1997) ("We therefore hold unambiguously that the defendants were not legally obligated to provide an on-site language interpreter to the plaintiff at the private school.").

These legal authorities not only demonstrate that there is no clear and unambiguous notice that R.H.'s arguments are correct, but also corroborate the accuracy of the Fifth Circuit's statements in rejecting R.H.'s argument that TLC was the default placement here. The Petition for Writ of Certiorari should be denied.

V. THERE ARE ALTERNATIVE GROUNDS TO SUPPORT THE FIFTH CIRCUIT'S JUDGMENT IN FAVOR OF PISD.

It is well-settled that a prevailing party may advance any ground before the Supreme Court in support of a judgment in his favor. *Trans World Airlines, Inc. v. Air Line Pilots Ass'n, International*, 469 U.S. 111, 105 S.Ct. 613, 621 (1985); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 90 S.Ct. 1153, 1156 (1970). Because the lower proceedings all concluded that R.H. was not entitled to reimbursement for his placement at TLC for the 2005-2006 school year because PISD offered him a FAPE in the least restrictive environment, there was little reason for the Hearing Officer or reviewing courts to expand their holdings with additional reasons as to why relief

should be denied. However, there are alternative grounds to support the Fifth Circuit's decision, making Supreme Court review even more unnecessary.

A. TLC was not appropriate for R.H.'s individualized needs.

Parents who remove their child from a public school without the school district's consent do so at their own financial risk, such that parents are entitled to reimbursement *only* if (i) the public placement violated the IDEA, and (ii) the private school placement was proper under IDEA. *Town of Burlington*, 471 U.S. at 369, 105 S.Ct. at 2002-2003. Every LRE analysis requires a placement determination qualified by appropriateness. 20 U.S.C. § 1412(a)(5)(A). In assessing what constituted the LRE for R.H., the Hearing Officer reviewed his individual needs and whether they could be met at both Beaty and TLC. (Pet. 18a-20a). The Hearing Officer did not accept R.H.'s argument that TLC was the LRE, ruling instead that in light of R.H.'s needs, Beaty was the appropriate placement in the LRE. (Pet. 20a). The Hearing Officer's decision on this point was affirmed by all courts below. (Pet. 46a-55a, 60a, 78a). Even assuming, *arguendo*, that PISD's placement for R.H. at Beaty could be considered inappropriate, R.H. cannot demonstrate from the facts in the record that he would be able to satisfy the second *Burlington* prong so as to be entitled to any reimbursement. The Petition for Writ of Certiorari should be denied.

B. PISD offered R.H. dual enrollment.

R.H. also fails to acknowledge that he was offered the option of dual enrollment at both Beaty and TLC, but it was refused. (Pet. 13a). Texas law grants parents of an eligible student ages three or four the right to "dual enroll" their student in both a public school and a private school beginning on the student's third birthday and continuing until the end of the school year in which the child turns five, or until the student is eligible to attend a district's public school kindergarten program, whichever comes first. 19 TEX. ADMIN. CODE § 89.1096(c). The dual enrollment option permits the ARD committee to determine which special education and/or related services will be provided to the student and the location where those services will be provided, consistent with the requirements concerning placement in the LRE. *Id.* PISD offered this dual enrollment option to R.H., which would allow R.H. to access any of the services in his IEP at Beaty, at public expense, while still permitting him to attend school at a private school of his choice, such as TLC, at parental expense. As a three-year old student with a disability, he is entitled to receive special education at public expense. However, nothing in the law requires school districts to pay for other education or services outside of those identified as necessary in his IEP. *See* 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34. Thus, the option of dual enrollment must also be considered when assessing whether PISD provided R.H. with a FAPE in the LRE. The offer of dual enrollment further demonstrates that Supreme Court review is unnecessary. The Petition for Writ of Certiorari should be denied.

C. R.H. did not comply with the IDEA's statutory notice requirement.

The IDEA limits the circumstances in which parents who have unilaterally placed their child in a private school are entitled to reimbursement for that placement. 20 U.S.C. § 1412(a)(10)(C). Reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove their child from public school before they do so. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). That notice can be provided either "at the most recent IEP meeting that the parents attended *prior* to removal of the child from the public school" or by written notice ten business days *prior* to such removal. 20 U.S.C. § 1412(a)(10)(C)(iii)(I) (emphasis added). The purpose of the statutory notice requirement is to give public school districts the opportunity to provide a FAPE *before* a child leaves public school and enrolls in private school. *Patricia P. v. Bd. of Edu.*, 203 F.3d 462, 468 (7th Cir. 2000) (emphasizing the importance of cooperation between parents and the school district before the child is removed from public school). Here, R.H. did not request an ARD committee meeting, nor did he notify PISD in writing of the intent to enroll at TLC and subsequently seek reimbursement. Only well after R.H. was unilaterally removed from PISD and enrolled at TLC, did R.H.'s parents request an ARD Committee meeting. (Pet. 11a-12a). By this point in time, R.H.'s parents were insisting upon an IEP that placed R.H. at TLC, and further stated to PISD that they would not remove him from TLC until an agreement could be made regarding his IEP. (Pet. 12a).

Here, the Hearing Officer exercised her discretion and denied reimbursement for the summer 2005 placement of R.H. at TLC because of the parents' failure to comply with the IDEA's statutory notice requirement. (Pet. 23a). The District Court and Fifth Circuit upheld the denial of reimbursement based on the failure to provide the statutorily required notice, holding that it was not an abuse of discretion. (Pet. 56a-57a, 82a-83a).

The Hearing Officer had no need to further rely upon this notice requirement as a basis to deny further reimbursement because she held that PISD had proposed an appropriate educational placement for R.H. for the 2005-2006 school year. (Pet. 24a). However, the parents' unilateral removal and subsequent refusal to return R.H. from TLC or consider any IEP that did not include R.H.'s placement at TLC, at PISD expense, effectively denied PISD of any meaningful opportunity to resolve the parents' concerns prior to removal. The Supreme Court recently noted that when a school district is determined to have failed to provide a FAPE, courts must consider all relevant equitable factors, including the notice provided by the parents in determining whether reimbursement for private placement is warranted. *Forest Grove Sch. Dist. v. T.A.*, __ U.S. __, 129 S.Ct. 2484, 2496 (2009). Here, a review of the equities should establish that the parents' unilateral removal and subsequent refusal to meaningfully consider any other placement for R.H. beyond publicly funded placement at TLC is contrary to the purpose of the IDEA's notice provision and justifies an alternative denial of reimbursement pursuant to 20 U.S.C. § 1412(a)(10)(C). The Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

R.H., by his parents and next friends
Emily and Matthew H.,
Petitioner,

v.

Plano Independent School District,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF

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INTRODUCTION

Commonly Used Acronyms

IEP: The Individualized Education Program means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 CFR 300.320 through 300.324, and that must include certain information including a statement of the child's present levels of academic achievement and functional performance.

IEE: The Independent Educational Evaluation is a guaranteed procedural safeguard for parents that must be considered in any decision made with respect to the provision of FAPE. 34 C.F.R. § 300.502.

LRE: Least Restrictive Environment means "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A).

As previously briefed, every circuit in this country applies similar factors in a mainstreaming

analysis used to determine whether a child has been provided an education in his/her LRE. This uniform test was not applied in this case as the Fifth Circuit carved out an unprecedented exception to its application for certain preschoolers. In the absence of this safeguard, R.H. and other preschoolers with disabilities are being arbitrarily restricted to special education classrooms, in violation of the Individuals with Disabilities Education Act. Upon review of the Brief in Opposition ("Opposition") submitted by respondent Plano Independent School District ("PISD"), a few misrepresentations of the record emerge which warrant clarification in order for the Court to properly consider R.H.'s Petition for Writ of Certiorari ("Petition").

1. In order to argue that the special education class rather than a mainstream class was the appropriate placement for the 2005-2006 school year, PISD is forced to rely on "needs" set forth in an IEP written when R.H. was 3 years old, an entire year prior to the disputed IEP with the disputed proposed placement which is the subject of this appeal. See the evidence cited by PISD at the top of p. 2 of its Opposition; *see also* R.H.'s Petition for Panel Rehearing to the Fifth Circuit found at Appendix D to Petitioner's Appendix to his Petition for Writ of Certiorari. In fact, the IEP in dispute was never finished or agreed to because of the parents' disagreement over those very needs, as well as R.H.'s placement, and other issues. See p. 87a-89a of the Appendix to the Petition. There is no evidence in the record that R.H. had those same needs or could not be mainstreamed for the relevant 2005-2006 school year. To the contrary, the IEE and his evidenced

success in the mainstream placement proved that R.H. was able to receive a satisfactory education in a mainstream class. Vol. II, page 87; P. Exh. 18-14/15 [Bates 420-421]. The fact that PISD has up to this point successfully relied on an old IEP to restrict R.H.'s later placement highlights the need for a uniform, mandatory mainstreaming analysis. Moreover, PISD should not be permitted to mischaracterize the evidence in order to create a factual dispute used to prevent certiorari from being granted.

2. It is undisputed in the underlying administrative record that PISD's proposed placement for R.H. at Beaty was in a full-time special education classroom for the 2005-2006 year. P. Exh. 14-12 [Bates 333].

3. In its attempt to turn this request for certiorari into a factual debate about R.H.'s unique needs, PISD conveniently remains silent about the undisputed fact that no one has ever made a mainstreaming assessment of R.H. based on the factors recognized by circuits across the country. Without this assessment, it was impossible to fairly determine what his needs and abilities truly were to answer the most fundamental question: can he be mainstreamed? The Fifth Circuit blessed a special education placement without ever asking this crucial question.

4. PISD's misleading focus on whether the lower courts considered a specific placement option – the private preschool TLC, completely ignores the central problem, which is that no one ever investigated other mainstream placement options. It is also important

factually that TLC was rejected because it was a private school; this is not the same as a finding that R.H. could not be mainstreamed. See the bottom of page 77a-78a of the Appendix to the Petition for this crucial distinction quoted in the Fifth Circuit's Opinion. There is no factual dispute that no other mainstream classrooms were investigated as placement options for R.H. PISD's self-serving attempt to re-characterize its full-time special education classroom as a mainstream classroom should not be used to prevent certiorari in this case.

5. PISD's assertion that the lower courts all found that PISD administered the program in the least restrictive environment (p. 4 of Opposition), begs the question of whether this finding is legally justifiable when it contradicts the unavoidable result of commonly applied mainstreaming analyses. The evidence that supports mainstreaming R.H. under the *Daniel R.R.* factors has never been disputed; the reason R.H.'s claim has been unsuccessful is because the factors have never been applied.

6. PISD frequently emphasizes that the placement must be *appropriate*. R.H. agrees. R.H. is asking this Court to require uniform application of the circuits' own analyses to make this determination rather than allowing courts to arbitrarily apply old IEPs, outdated needs and skill sets, while ignoring all independent and current evaluations in the record that support a mainstream placement. Only the uniform application of such a child-centered analysis will ensure equal protection of the law in order to protect a child's right to be mainstreamed to *the*

maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A).

PRIMARY ARGUMENT

In order to evaluate whether R.H.'s contested IEP could be implemented in the LRE, the lower courts should have utilized the mainstreaming factors recognized by circuits across the country and asked whether:

a) the school district took steps to accommodate R.H. in a regular class before assuming he needed a special education class; b) R.H. obtained educational benefit when his IEP was implemented in the regular education classroom; c) R.H. obtained non-academic benefit when his IEP was implemented in the regular education classroom; d) R.H.'s presence in the regular education classroom did not detrimentally affect the other students in the classroom; and e) there were regular preschool class options close to R.H.'s residence.

It is uncontested in PISD's Opposition and in the record that these questions have never been asked with respect to R.H. This failure to apply a mainstreaming analysis is of even greater concern when, as in this case, all of the evidence in the record supports a mainstream placement under every factor of the analysis. Failing to apply this analysis, PISD then made no attempt to provide a mainstream classroom, and this failure has been blessed by the Fifth Circuit.

PISD vaguely states only that "the Fifth Circuit carefully applied the mainstreaming analysis in the full context of determining whether PISD's offered educational program for R.H. provided him with a free *appropriate* public education." Opposition at 15 (emphasis in original). Where is this analysis? How do you legitimately determine what is *appropriate* without this analysis? This analysis must be applied for every child in determining that child's LRE to consistently protect a child's federally recognized right to be mainstreamed to the maximum extent appropriate. It is this essential undisputed fact that PISD and the lower courts failed to apply this safeguard, a mainstream analysis, that provides the basis for granting certiorari in this case.

PISD's attempt to obfuscate this failure by instead discussing misused facts in the record does nothing to eliminate the problematic circuit splits set forth by R.H. in his Petition.

In its Opposition, PISD states that "R.H. cannot dispute that his placement at Beaty provided age-appropriate instruction alongside typically developing peers. R.H.'s petition thus presents a false case for review by assuming TLC, and not Beaty, was the regular educational environment." However, Beaty is precisely the type of preschool placement that is at issue in the circuit split cases relied on by R.H. in his Petition. These cases clearly establish that hybrid preschool classrooms (special education classes with some typically developing peers) are more restrictive than a fully mainstreamed preschool class, which is why they often do not constitute the LRE. After all, as self-

reported by PISD, R.H.'s proposed placement at Beaty was in a full-time special education classroom...this is no "false case" as PISD claims. P. Exh. 14-12 [Bates 333].

While certain circuits have determined that it is not required under the IDEA to seek to maximize a student's potential, there is no such vagueness in the LRE provision. The LRE provision of the IDEA is the only place in the Act where maximization is explicitly required in the statutory definition with the language "to the maximum extent appropriate." "Some" exposure to nondisabled peers in an integrated full-time special education classroom (as defined by PISD itself) cannot satisfy this maximization requirement for a child who can receive a satisfactory education in a mainstream class. Providing "some" exposure to typical peers in a special education classroom fails to meet the substantive provision of this requirement for such a child on multiple counts. It fails to maximize 1) the extent of exposure to nondisabled peers 2) in the regular class and 3) access to the general curriculum. The courts must rely on the statutory language for guidance on decisions. The Supreme Court has directed courts interpreting the IDEA to start with the text of the statute and has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). The Court has also stated that "[w]hen the statutory 'language is plain, the sole

function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms.'" *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)); accord *Newby v. Enron Corp.*, 338 F.3d 467, 473 (5th Cir.2003) (noting that the plain language of a statute governs when it is "clear on its face").

Finally, PISD has attempted to confuse the issue throughout this litigation by arguing that this is a case of private v. public placement. However, the parents were not requesting private school, but rather a mainstream placement.[1] Thus, PISD's first "Question Presented" to the Court completely mischaracterizes the relief that R.H. is seeking – no private preschool mandate is required or requested.

OTHER ISSUES RAISED BY PISD

1. Spending Clause

PISD again wrongly claims that R.H. is asking the Court to define private schools as the "regular educational environment" for preschool children, thus requiring public school districts to place

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[1] See PISD's notice of refusals at P. Exh. 11-1 [Bates 279] (parents requested natural ratio of typically developing peers to students with an IEP); P. Exh. 15-3 [Bates 347] (parents requested high volume of peers); P. Exh 5-2 [Bates 279] ("it is our desire for Beaty to be able to provide the changes to his IEP that R.H. currently needs..."). A request for private placement at TLC is denied for the first time in January 2006 after five months of the parents' attempted collaboration with PISD to provide a mainstream option. See P. Exh. 19-4 [Bates 427].

preschool children in private schools. This is an absurd characterization of the relief R.H. is in fact requesting: that the courts be required to consistently and uniformly apply their own mainstreaming analyses and if it is determined that a child can be mainstreamed, to investigate preschool mainstream options available. This can be Head Start, Early Learning Centers, private preschools, kindergarten, etc. School districts have plenty of available mainstreaming options for preschoolers to choose between. However, if they are to receive the financial benefit of federal funding for complying with the IDEA, then they need to choose options that comply with the IDEA, including the mainstreaming mandate. While "there is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA...public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 14, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993).

2. Appropriateness of TLC

Even if TLC was not appropriate, this does not relieve PISD and the courts of the responsibility to determine whether R.H. could be mainstreamed and whether there were any appropriate mainstream placements available. However, contrary to PISD's

assertion, the appropriateness of TLC was expressly avoided by the lower courts and has never been made. The Hearing Officer never made this determination because, as she stated, if she "finds that the District's proposed program is appropriate, it is not necessary to reach the appropriateness of the private school placement." Amended Decision of Hearing Officer at p. 11 (Bates 0049). Similarly, the District Court stated it "need not reach what the record shows about whether TLC was considered by the District in order to find that the District provided him with a FAPE in the LRE." Record on Appeal 702-703. This is not a hypothetical case – R.H. remained in a mainstream class at TLC with occupational and speech therapy funded by his parents until he entered kindergarten and thrived there. R.H. has since been officially dismissed from special education by PISD and continues to be successfully educated in a mainstream third grade classroom at his local public elementary school. PISD should not be permitted to invent factual and legal conclusions for the sake of avoiding certiorari. Under *School Comm. of the Town of Burlington v. Department of Educ.*, 471 U.S. 359, 373 (1985), the appropriateness of TLC indeed would need to be evaluated before determining whether R.H. is entitled to reimbursement. However, this determination never having been made, it is not the issue that has gone up on appeal and this inquiry does not inform nor affect the questions presented to the Court by R.H. in his Petition. Whether the school district violated the IDEA by failing to provide a LRE is a wholly separate issue than whether R.H. is entitled to reimbursement.

3. Dual Enrollment

Although PISD argued to the lower courts that its offer of limited dual enrollment satisfied its LRE obligation, no lower court discussed this issue, and dual enrollment was not part of the basis of any underlying decision that PISD met its LRE obligation. Thus, whether or not limited dual enrollment satisfies PISD's LRE obligation is not part of the present appeal, nor can it be. This issue does nothing to inform nor affect the questions presented to the Court by R.H. in his Petition.

4. Notice Requirement

The Fifth Circuit affirmed the hearing officer's ruling that the notice requirement bars R.H. from relief for the summer of 2005. No one has alleged or found that R.H. is barred from reimbursement for the 2005-2006 school year and beyond. See Amended Decision of Hearing Officer at 11 (Bates 0049) ("Petitioner also requests reimbursement for costs incurred from the fall, 2005 through the present about which he provided notice to the District..."). This is another straw dog presented by PISD to further confuse the issue.

CONCLUSION

PISD quotes Congress at p. 25 of its Opposition, explaining that the intent of the IDEA was to rectify the fact that prior to the Act "a lack of adequate resources within the public school system forced families to find services *outside* the public school

system." (citation omitted) (emphasis added by PISD). What PISD fails to recognize is that is precisely what is still happening to preschoolers like R.H. When the school districts fail to apply a mainstreaming analysis and instead arbitrarily place preschoolers with disabilities into full-time special education classrooms, parents are forced to remove their child from the public school system and place their child in a private preschool in order to access a mainstream setting. This is exactly what the IDEA intended to prevent. We would never permit this for a school-age child; and under the clear language of the IDEA, a preschooler's protection is no less. 34 C. F. R. § 300.116(a). The lower court opinions are all completely devoid of any discussion of the *Daniel R.R.* factors (the version of the mainstreaming analysis used by the Fifth Circuit) and are therefore devoid of any discussion of alternative mainstream preschool placement options. This is unacceptable and contrary to preschool LRE cases in other circuits. For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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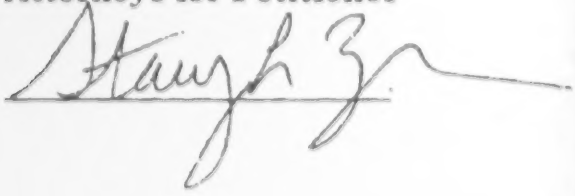

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